From: Jason Peltier
Sent: Thursday, June 14, 2012 5:56 AM
To: Tom Birmingham; Joe Findaro; David Bernhardt
Subject: Fwd: From E&ENews PM -- ENDANGERED SPECIES: Though voluntary, lizard conservation agreements will be kept -- DOI

FYI

Begin forwarded message:

> **From:** "[redacted]" <[redacted]>
> **Date:** June 13, 2012 9:55:55 PM PDT
> **To:** Jason Peltier <jpeltier@westlandswater.org>, "Kightlinger,Jeffrey" <jkightlinger@mwdh2o.com>
> **Subject: FW: From E&ENews PM -- ENDANGERED SPECIES: Though voluntary, lizard conservation agreements will be kept -- DOI**
>
> This news really hit the press today
>
> ---
>
> **From:** mike.chrisman@nfwf.org [mailto:mike.chrisman@nfwf.org]
> **Sent:** Wednesday, June 13, 2012 2:38 PM
> **To:** [redacted] daniel.petit@nfwf.org; dave.gagner@nfwf.org; tom.kelsch@nfwf.org; claude.gascon@nfwf.org
> **Subject:** From E&ENews PM -- ENDANGERED SPECIES: Though voluntary, lizard conservation agreements will be kept -- DOI
>
> **This E&ENews PM story was sent to you by:** mike.chrisman@nfwf.org
>
> **Personal message:** more on the lizard....
>
> E&ENEWS PM
>
> AN E&E PUBLISHING SERVICE
>
> **ENDANGERED SPECIES: Though voluntary, lizard conservation agreements will be kept -- DOI** *(Wednesday, June 13, 2012)*
>
> **Phil Taylor, E&E reporter**
>
> Land users in New Mexico and Texas will be held accountable for agreements to conserve and restore habitat for the dunes sagebrush lizard, Obama administration officials said today after withdrawing a proposal to list the reptile under the Endangered Species Act.
>
> While the scores of oil and gas companies, ranchers and other land users who signed voluntary conservation agreements are not legally obligated to follow them, he potential for a future listing gives them every incentive to do so, said Fish and Wildlife Service Director Dan Ashe.
>
> "Voluntary conservation is voluntary conservation," Ashe said during a conference call this afternoon with reporters. "But we are going to hold the parties accountable. If they don't live up to the agreements and we continue to lose the habitat for the dunes sagebrush lizard, then we can propose to list it."
>
> Today's decision to withdraw a December 2010 proposal to list the 3-inch-long lizard as endangered was widely praised by lawmakers, local officials, and the oil and gas ndustry (*Greenwire*, June 13). While opposed by WildEarth Guardians and the Center for Biological Diversity, which petitioned to list the lizard in 2002, the move was endorsed this afternoon by the Environmental Defense Fund, which praised the administration's proactive engagement with landowners.

"We're very pleased with this approach," said David Festa, vice president of EDF's land, water and wildlife program, noting that a vast majority of wildlife depends on private ands for survival. "We think our first tool in the toolkit should be forming mutually beneficial alliances like this."

Interior Secretary Ken Salazar said that the mixed reaction among environmental groups is not unexpected, but that some groups "may just want to keep the conflict going for conflict's sake."

Ashe said today's decision was "science-driven" and the result of "an unprecedented commitment to voluntary conservation."

Agreements totaling roughly 650,000 acres -- covering 88 percent of the lizard's habitat -- are already bearing fruit, he said. In New Mexico, more than 100 old drilling pads and associated roads within lizard habitat have been reclaimed, he said. In Texas, $800,000 is available for permit holders to begin habitat restoration prior to any disturbance of dunes lizard habitat.

In addi ion, steps will be taken to keep oil and gas development out of occupied lizard habitat. The destruction of shinnery oak through herbicide and off-highway vehicle use will be curtailed, he said.

"We believe here's clear and compelling evidence that these conservation agreements are going to be effective," he said. As a backstop, the agency will continue to monitor the lizard's habitat and reserves the right to reinitiate a listing in the future, he said.

But those assurances did little to appease the Center for Biological Diversity, which blamed today's decision on oil industry lobbying and a Republican-led misinformation campaign.

The group in the past has criticized the Texas conservation plan for giving landowners and oil and gas operators too much discretion to decide when to protect the lizard. The state's plan is riddled with phrases such as "when possible," "when practical" and "when feasible" (*Greenwire*, March 23).

"Today's decision was based on politics, not science," said CBD's Taylor McKinnon. "By caving to the oil and gas industry, the Obama administration is doing wrong by this rare lizard, it's ignoring science and it's setting a dangerous precedent for other declining species."

Salazar said he's hopeful the success in conserving the lizard could be replicated elsewhere in the West to conserve and preclude a listing for the sage grouse. A court settlement requires FWS to issue a final listing determination for the football-sized bird by 2015.

Governors, state wildlife agencies, ranchers, hunters and conservationists working to protect sage grouse across several states should "take inspiration" from today's decision, Salazar said.

Sen. James Inhofe (R-Okla.), a frequent critic of Endangered Species Act regulations, said after speaking with Ashe today that he believes voluntary conservation agreements could also prevent an ESA listing for the lesser prairie chicken, which he contends would be disastrous for the state's energy industry.

"This listing was prevented by the tremendously successful cooperation between local, state and private landowners working together to save the sand dune lizard -- and Oklahoma is having the same success in stabilizing the lesser prairie-chicken population," he said in a statement. "I was very encouraged by Director Ashe's assurance today that Oklahoma has the 'right ingredients' for a similar decision on the lesser prairie-chicken."

FWS's settlement with environmental groups requires a proposal for the prairie chicken, which is a candidate for listing, this year.

While today's withdrawal is not unprecedented, past court cases suggest the agency could face difficult legal challenges in the months and years ahead.

For example, a federal court in Oregon declared the National Marine Fisheries Service had improperly relied on the state's voluntary conservation plan when it withdrew a proposal to list the coho salmon in 1997. That same year, a federal court in Texas overturned FWS's decision to withdraw its proposed listing of the rare Barton Springs salamander, arguing the state's conservation plan does "not take any tangible steps to reduce he immediate threat to the species."

"They've got to be sure that those conservation efforts are truly effective and truly enforceable," said Bill Snape, an attorney with CBD.

"We may litigate, and we're certainly going to watch the situation extraordinarily carefully," Snape added. "If this is a true pig in a poke, we're going to go after the agency."

But the court of public opinion today appeared largely supportive.

In a coarse jab at government's regulatory reach, the Texas General Land Office today announced, "Federal reptile dysfunction defeated."

"This is a major victory for Texas jobs and our energy economy," said Texas Comptroller Susan Combs, who led the state's conservation plan and lauded energy producers and other stakeholders who enrolled nearly 250,000 acres in west Texas. "This decision proves we don't have to choose between the environment and our economy, but can be good stewards of both."

Sen. John Cornyn (R-Texas), who authored legislative proposals to prevent a lizard listing, said today's decision was made possible by FWS's agreement to his request to delay its decision by six months.

"Today's decision shows us the value in local input and due diligence when it comes to federal rulings on local issues," he said. "Through a six-month delay, Texans who would be impacted the most were given the time they needed to gather compelling data that played a critical role in the preventing the listing."

Sen. Tom Udall joined fellow New Mexico Democrat Sen. Jeff Bingaman in praising the decision.

"Today's decision is unprecedented in the history of the Endangered Species Act and represents a potential breakthrough in maximizing ecosystem preservation and minimizing conflict," Udall said. "It's the result of months of collaboration and serves as a testament to the positive efforts of New Mexico land agencies, ranchers and oil and gas producers who reached a compact that simultaneously protects the local economy and the lizard."

ABOUT E&ENEWS PM

E&ENews PM is written and produced by the staff of E&E Publishing, LLC. A late afternoon roundup providing coverage of all the breaking and developing policy news from Capitol Hill, around the country and around the world, E&ENews PM is a must-read for the key players who need to be ahead of the next day's headlines. E&ENews PM publishes daily at 4:30 p.m.

E&E PUBLISHING, LLC
www.eenews.net

E&E Publishing, LLC
122 C St , Ste 722, NW, Wash , D C 20001
Phone: 202-628-6500 Fax: 202-737-5299
www eenews net

From: Sims, Steven O.
Sent: Wednesday, February 27, 2013 12:56 PM
To: 'Durkee, Ellen (ENRD)'; Cliff Lee; 'Steven Martin'
CC: 'agalbraith@herumcrabtree.com'; 'ahuang@nossaman.com'; Allison Goldsmith; 'ameliam@kcwa.com'; 'aremillard@nossaman.com'; 'bmm@pacificlegal.org'; 'bparis@olaughlinparis.com'; 'ccarr@mofo.com'; Cecilia Dennis; 'cmanson@westlandswater.org'; Daniel Harris; 'ddiepenbrock@diepenbrock.com'; 'dobegi@nrdc.org'; 'dohanlon@kmtg.com'; 'emd@diepenbrock.com'; 'etobin@earthjustice.org'; 'ewashburn@mofo.com'; Gregory Wilkinson; Williamson, Geoffrey M.; 'hwalter@kmtg.com'; 'jmarz@diepenbrock.com'; 'jspaletta@herumcrabtree.com'; 'jzolezzi@herumcrabtree.com'; 'kharrigfeld@herumcrabtree.com'; 'kpoole@nrdc.org'; 'lmasouredis@mwdh2o.com'; Fitzgerald, Martha L.; Melissa Cushman; Michael Edson; Kales, Michelle C.; Mathews, Mark J.; 'mrh@pacificlegal.org'; 'msherwood@earthjustice.org'; 'pweiland@nossaman.com'; 'rackroyd@kmtg.com'; 'rthornton@nossaman.com'; Steve Anderson; 'tbrandon@mofo.com'; 'tbrooks@olaughlinparis.com'; 'wsloan@mofo.com'; Strickland, Wes; Bernhardt, David L.
Subject: RE: Consolidated Salmonid Cases, 9th Cir. No. 12-15144 (Cross-Appeal Nos. 12-15289, 12-15290, 12-15291,12-15293, 12-15296)

Ellen-
I have conferred with the Plaintiffs' attorneys and we consent to Federal Defendants and Defendant-Intervenors request for an extension to and including March 20 as long as you specifically state in your request that Federal Defendants and Defendant-Intervenors will not seek further extensions. We also want a May 20 due date for the cross-appellees' reply briefs. We agree to this change in the briefing schedule with the understanding that our agreement does not preclude us from seeking additional extensions if we believe them to be necessary.

Let me know if you have questions.

Steve

Steven O. Sims
Brownstein Hyatt Farber Schreck, LLP
410 Seventeenth Street
Twenty-Second Floor
Denver, Colorado 80202-4437
ssims@bhfs.com
Denver Direct 303.223.1149
New Mexico Direct 505.724.9591
Cell [redacted]

From: Durkee, Ellen (ENRD) [mailto:Ellen.Durkee@usdoj.gov]
Sent: Wednesday, February 27, 2013 11:44 AM
To: Cliff Lee; 'Steven Martin'
Cc: 'agalbraith@herumcrabtree.com'; 'ahuang@nossaman.com'; Allison Goldsmith; 'ameliam@kcwa.com'; 'aremillard@nossaman.com'; 'bmm@pacificlegal.org'; 'bparis@olaughlinparis.com'; 'ccarr@mofo.com'; Cecilia Dennis; 'cmanson@westlandswater.org'; Daniel Harris; 'ddiepenbrock@diepenbrock.com'; 'dobegi@nrdc.org'; 'dohanlon@kmtg.com'; 'emd@diepenbrock.com'; 'etobin@earthjustice.org'; 'ewashburn@mofo.com'; Gregory Wilkinson; Williamson, Geoffrey M.; 'hwalter@kmtg.com'; 'jmarz@diepenbrock.com'; 'jspaletta@herumcrabtree.com'; 'jzolezzi@herumcrabtree.com'; 'kharrigfeld@herumcrabtree.com'; 'kpoole@nrdc.org'; 'lmasouredis@mwdh2o.com'; Fitzgerald, Martha L.; Melissa Cushman; Michael Edson; Kales, Michelle C.; Mathews, Mark J.; 'mrh@pacificlegal.org'; 'msherwood@earthjustice.org'; 'pweiland@nossaman.com'; 'rackroyd@kmtg.com'; 'rthornton@nossaman.com'; Sims, Steven O.; Steve Anderson; 'tbrandon@mofo.com'; 'tbrooks@olaughlinparis.com'; 'wsloan@mofo.com'; Strickland, Wes; Bernhardt, David L.
Subject: RE: Consolidated Salmonid Cases, 9th Cir. No. 12-15144 (Cross-Appeal Nos. 12-15289, 12-15290, 12-15291,12-15293, 12-15296)

I am writing to ask for your consent to another extension -- to March 20 -- for the filing of Federal Defendants' response/reply brief (that is currently due on March 6). As you know the case is complex and the issues many. The officials that are required to review and approve the draft are unable to complete review in time to allow for a March 6 filing. This has only just become apparent to me and my managers have asked that I seek an extension. In addition, while I may still have to seek an enlargement in size, with additional time we can shorten the draft further, which will benefit the court and parties. (The paradox is true that with more time, a brief can be shorter)

I have not been in contact with intervenor defendants about this request, so I do not know if they will want a comparable extension, but I invite them to let everyone know their position by response to this email.

If this request is unopposed then I will ask the mediator to enter the extension. I will also ask for a May 4 due date for the cross-appellees' reply brief(s) – or another date that suggest. If opposed, we will file a written motion.

Thank you for your understanding.

Best regards,

Ellen J. Durkee
Appellate Section
Environment & Natural Resources Division
Department of Justice
(202) 514-4426

From: Erin Tobin
Sent: Wednesday, February 27, 2013 1:06 PM
To: Durkee, Ellen (ENRD); Sims, Steven O.; Cliff Lee; 'Steven Martin'
CC: 'agalbraith@herumcrabtree.com'; 'ahuang@nossaman.com'; Allison Goldsmith; 'ameliam@kcwa.com'; 'aremillard@nossaman.com'; 'bmm@pacificlegal.org'; 'bparis@olaughlinparis.com'; 'ccarr@mofo.com'; Cecilia Dennis; 'cmanson@westlandswater.org'; Daniel Harris; 'ddiepenbrock@diepenbrock.com'; 'dobegi@nrdc.org'; 'dohanlon@kmtg.com'; 'emd@diepenbrock.com'; 'ewashburn@mofo.com'; Gregory Wilkinson; Williamson, Geoffrey M.; 'hwalter@kmtg.com'; 'jmarz@diepenbrock.com'; 'jspaletta@herumcrabtree.com'; 'jzolezzi@herumcrabtree.com'; 'kharrigfeld@herumcrabtree.com'; 'kpoole@nrdc.org'; 'lmasouredis@mwdh2o.com'; Fitzgerald, Martha L.; Melissa Cushman; Michael Edson; Kales, Michelle C.; Mathews, Mark J.; 'mrh@pacificlegal.org'; Mike Sherwood; 'pweiland@nossaman.com'; 'rackroyd@kmtg.com'; 'rthornton@nossaman.com'; Steve Anderson; 'tbrandon@mofo.com'; 'tbrooks@olaughlinparis.com'; 'wsloan@mofo.com'; Strickland, Wes; Bernhardt, David L.
Subject: RE: Consolidated Salmonid Cases, 9th Cir. No. 12-15144 (Cross-Appeal Nos. 12-15289, 12-15290, 12-15291,12-15293, 12-15296)

Defendant Intervenors agree as well.

Erin

From: Durkee, Ellen (ENRD) [mailto:Ellen.Durkee@usdoj.gov]
Sent: Wednesday, February 27, 2013 12:04 PM
To: Sims, Steven O.; Cliff Lee; 'Steven Martin'
Cc: 'agalbraith@herumcrabtree.com'; 'ahuang@nossaman.com'; Allison Goldsmith; 'ameliam@kcwa.com'; 'aremillard@nossaman.com'; 'bmm@pacificlegal.org'; 'bparis@olaughlinparis.com'; 'ccarr@mofo.com'; Cecilia Dennis; 'cmanson@westlandswater.org'; Daniel Harris; 'ddiepenbrock@diepenbrock.com'; 'dobegi@nrdc.org'; 'dohanlon@kmtg.com'; 'emd@diepenbrock.com'; Erin Tobin; 'ewashburn@mofo.com'; Gregory Wilkinson; Williamson, Geoffrey M.; 'hwalter@kmtg.com'; 'jmarz@diepenbrock.com'; 'jspaletta@herumcrabtree.com'; 'jzolezzi@herumcrabtree.com'; 'kharrigfeld@herumcrabtree.com'; 'kpoole@nrdc.org'; 'lmasouredis@mwdh2o.com'; Fitzgerald, Martha L.; Melissa Cushman; Michael Edson; Kales, Michelle C.; Mathews, Mark J.; 'mrh@pacificlegal.org'; Mike Sherwood; 'pweiland@nossaman.com'; 'rackroyd@kmtg.com'; 'rthornton@nossaman.com'; Steve Anderson; 'tbrandon@mofo.com'; 'tbrooks@olaughlinparis.com'; 'wsloan@mofo.com'; Strickland, Wes; Bernhardt, David L.
Subject: RE: Consolidated Salmonid Cases, 9th Cir. No. 12-15144 (Cross-Appeal Nos. 12-15289, 12-15290, 12-15291,12-15293, 12-15296)

Agreed as to your conditions. Thanks, Ellen

From: Sims, Steven O. [mailto:SSims@BHFS.com]
Sent: Wednesday, February 27, 2013 2:56 PM
To: Durkee, Ellen (ENRD); Cliff Lee; 'Steven Martin'
Cc: 'agalbraith@herumcrabtree.com'; 'ahuang@nossaman.com'; Allison Goldsmith; 'ameliam@kcwa.com'; 'aremillard@nossaman.com'; 'bmm@pacificlegal.org'; 'bparis@olaughlinparis.com'; 'ccarr@mofo.com'; Cecilia Dennis; 'cmanson@westlandswater.org'; Daniel Harris; 'ddiepenbrock@diepenbrock.com'; 'dobegi@nrdc.org'; 'dohanlon@kmtg.com'; 'emd@diepenbrock.com'; 'etobin@earthjustice.org'; 'ewashburn@mofo.com'; Gregory Wilkinson; Williamson, Geoffrey M.; 'hwalter@kmtg.com'; 'jmarz@diepenbrock.com'; 'jspaletta@herumcrabtree.com'; 'jzolezzi@herumcrabtree.com'; 'kharrigfeld@herumcrabtree.com'; 'kpoole@nrdc.org'; 'lmasouredis@mwdh2o.com'; Fitzgerald, Martha L.; Melissa Cushman; Michael Edson; Kales, Michelle C.; Mathews, Mark J.; 'mrh@pacificlegal.org'; 'msherwood@earthjustice.org'; 'pweiland@nossaman.com'; 'rackroyd@kmtg.com'; 'rthornton@nossaman.com'; Steve Anderson; 'tbrandon@mofo.com'; 'tbrooks@olaughlinparis.com'; 'wsloan@mofo.com'; Strickland, Wes; Bernhardt, David L.
Subject: RE: Consolidated Salmonid Cases, 9th Cir. No. 12-15144 (Cross-Appeal Nos. 12-15289, 12-15290, 12-15291,12-15293, 12-15296)

Ellen-

I have conferred with the Plaintiffs' attorneys and we consent to Federal Defendants and Defendant-Intervenors request for an extension to and including March 20 as long as you specifically state in your request that Federal Defendants and Defendant-Intervenors will not seek further extensions. We also want a May 20 due date for the cross-appellees' reply briefs. We agree to this change in the briefing schedule with the understanding that our agreement does not preclude us from seeking additional extensions if we believe them to be necessary.

Let me know if you have questions.

Steve

Steven O. Sims
Brownstein Hyatt Farber Schreck, LLP
410 Seventeenth Street
Twenty-Second Floor
Denver, Colorado 80202-4437
ssims@bhfs.com
Denver Direct 303.223.1149
New Mexico Direct 505.724.9591
Cell [redacted]

From: Durkee, Ellen (ENRD) [mailto:Ellen.Durkee@usdoj.gov]
Sent: Wednesday, February 27, 2013 11:44 AM
To: Cliff Lee; 'Steven Martin'
Cc: 'agalbraith@herumcrabtree.com'; 'ahuang@nossaman.com'; Allison Goldsmith; 'ameliam@kcwa.com'; 'aremillard@nossaman.com'; 'bmm@pacificlegal.org'; 'bparis@olaughlinparis.com'; 'ccarr@mofo.com'; Cecilia Dennis; 'cmanson@westlandswater.org'; Daniel Harris; 'ddiepenbrock@diepenbrock.com'; 'dobegi@nrdc.org'; 'dohanlon@kmtg.com'; 'emd@diepenbrock.com'; 'etobin@earthjustice.org'; 'ewashburn@mofo.com'; Gregory Wilkinson; Williamson, Geoffrey M.; 'hwalter@kmtg.com'; 'jmarz@diepenbrock.com'; 'jspaletta@herumcrabtree.com'; 'jzolezzi@herumcrabtree.com'; 'kharrigfeld@herumcrabtree.com'; 'kpoole@nrdc.org'; 'lmasouredis@mwdh2o.com'; Fitzgerald, Martha L.; Melissa Cushman; Michael Edson; Kales, Michelle C.; Mathews, Mark J.; 'mrh@pacificlegal.org'; 'msherwood@earthjustice.org'; 'pweiland@nossaman.com'; 'rackroyd@kmtg.com'; 'rthornton@nossaman.com'; Sims, Steven O.; Steve Anderson; 'tbrandon@mofo.com'; 'tbrooks@olaughlinparis.com'; 'wsloan@mofo.com'; Strickland, Wes; Bernhardt, David L.
Subject: RE: Consolidated Salmonid Cases, 9th Cir. No. 12-15144 (Cross-Appeal Nos. 12-15289, 12-15290, 12-15291,12-15293, 12-15296)

I am writing to ask for your consent to another extension -- to March 20 -- for the filing of Federal Defendants' response/reply brief (that is currently due on March 6). As you know the case is complex and the issues many. The officials that are required to review and approve the draft are unable to complete review in time to allow for a March 6 filing. This has only just become apparent to me and my managers have asked that I seek an extension. In addition, while I may still have to seek an enlargement in size, with additional time we can shorten the draft further, which will benefit the court and parties. (The paradox is true that with more time, a brief can be shorter)

I have not been in contact with intervenor defendants about this request, so I do not know if they will want a comparable extension, but I invite them to let everyone know their position by response to this email.

If this request is unopposed then I will ask the mediator to enter the extension. I will also ask for a May 4 due date for the cross-appellees' reply brief(s) – or another date that suggest. If opposed, we will file a written motion.

Thank you for your understanding.

Best regards,

Ellen J. Durkee
Appellate Section
Environment & Natural Resources Division
Department of Justice

(202) 514-4426

From: Durkee, Ellen (ENRD)
Sent: Wednesday, February 27, 2013 1:20 PM
To: Ann_Julius@ca9.uscourts.gov; Erin Tobin; Sims, Steven O.; Cliff Lee; 'Steven Martin'; Mergen, Andy (ENRD)
CC: 'agalbraith@herumcrabtree.com'; 'ahuang@nossaman.com'; Allison Goldsmith; 'ameliam@kcwa.com'; 'aremillard@nossaman.com'; 'bmm@pacificlegal.org'; 'bparis@olaughlinparis.com'; 'ccarr@mofo.com'; Cecilia Dennis; 'cmanson@westlandswater.org'; Daniel Harris; 'ddiepenbrock@diepenbrock.com'; 'dobegi@nrdc.org'; 'dohanlon@kmtg.com'; 'emd@diepenbrock.com'; 'ewashburn@mofo.com'; Gregory Wilkinson; Williamson, Geoffrey M.; 'hwalter@kmtg.com'; 'jmarz@diepenbrock.com'; 'jspaletta@herumcrabtree.com'; 'jzolezzi@herumcrabtree.com'; 'kharrigfeld@herumcrabtree.com'; 'kpoole@nrdc.org'; 'lmasouredis@mwdh2o.com'; Fitzgerald, Martha L.; Melissa Cushman; Michael Edson; Kales, Michelle C.; Mathews, Mark J.; 'mrh@pacificlegal.org'; Mike Sherwood; 'pweiland@nossaman.com'; 'rackroyd@kmtg.com'; 'rthornton@nossaman.com'; Steve Anderson; 'tbrandon@mofo.com'; 'tbrooks@olaughlinparis.com'; 'wsloan@mofo.com'; Strickland, Wes; Bernhardt, David L.
Subject: RE: Consolidated Salmonid Cases, 9th Cir. No. 12-15144 (Cross-Appeal Nos. 12-15289, 12-15290, 12-15291,12-15293, 12-15296)

Ms. Julius,
As the email chain below confirms, I am writing to ask that you enter an order, as you have in the past, granting an unopposed motion for extension for federal defendants' and intervenor defendants' response/reply briefs to and including March 20. Plaintiffs consent to this request provided that Federal Defendants and Defendant-Intervenors specifically state in our request that we will not seek further extensions. Federal defendants and intervenor defendants so agree. The parties also request that the order set a May 20 due date for the cross-appellees' reply briefs. The order should indicate that the change in the briefing schedule for cross-appellees' reply brief does not preclude cross-appellees from seeking additional extensions if they believe them to be necessary.
Thank you,

Ellen J. Durkee
Appellate Section
Environment & Natural Resources Division
Department of Justice
(202) 514-4426

From: Erin Tobin [mailto:etobin@earthjustice.org]
Sent: Wednesday, February 27, 2013 3:06 PM
To: Durkee, Ellen (ENRD); Sims, Steven O.; Cliff Lee; 'Steven Martin'
Cc: 'agalbraith@herumcrabtree.com'; 'ahuang@nossaman.com'; Allison Goldsmith; 'ameliam@kcwa.com'; 'aremillard@nossaman.com'; 'bmm@pacificlegal.org'; 'bparis@olaughlinparis.com'; 'ccarr@mofo.com'; Cecilia Dennis; 'cmanson@westlandswater.org'; Daniel Harris; 'ddiepenbrock@diepenbrock.com'; 'dobegi@nrdc.org'; 'dohanlon@kmtg.com'; 'emd@diepenbrock.com'; 'ewashburn@mofo.com'; Gregory Wilkinson; Williamson, Geoffrey M.; 'hwalter@kmtg.com'; 'jmarz@diepenbrock.com'; 'jspaletta@herumcrabtree.com'; 'jzolezzi@herumcrabtree.com'; 'kharrigfeld@herumcrabtree.com'; 'kpoole@nrdc.org'; 'lmasouredis@mwdh2o.com'; Fitzgerald, Martha L.; Melissa Cushman; Michael Edson; Kales, Michelle C.; Mathews, Mark J.; 'mrh@pacificlegal.org'; Mike Sherwood; 'pweiland@nossaman.com'; 'rackroyd@kmtg.com'; 'rthornton@nossaman.com'; Steve Anderson; 'tbrandon@mofo.com'; 'tbrooks@olaughlinparis.com'; 'wsloan@mofo.com'; Strickland, Wes; Bernhardt, David L.
Subject: RE: Consolidated Salmonid Cases, 9th Cir. No. 12-15144 (Cross-Appeal Nos. 12-15289, 12-15290, 12-15291,12-15293, 12-15296)

Defendant Intervenors agree as well.

Erin

From: Durkee, Ellen (ENRD) [mailto:Ellen.Durkee@usdoj.gov]
Sent: Wednesday, February 27, 2013 12:04 PM
To: Sims, Steven O.; Cliff Lee; 'Steven Martin'
Cc: 'agalbraith@herumcrabtree.com'; 'ahuang@nossaman.com'; Allison Goldsmith; 'ameliam@kcwa.com'; 'aremillard@nossaman.com'; 'bmm@pacificlegal.org'; 'bparis@olaughlinparis.com'; 'ccarr@mofo.com'; Cecilia Dennis; 'cmanson@westlandswater.org'; Daniel Harris; 'ddiepenbrock@diepenbrock.com'; 'dobegi@nrdc.org'; 'dohanlon@kmtg.com'; 'emd@diepenbrock.com'; Erin Tobin; 'ewashburn@mofo.com'; Gregory Wilkinson; Williamson, Geoffrey M.; 'hwalter@kmtg.com'; 'jmarz@diepenbrock.com'; 'jspaletta@herumcrabtree.com'; 'jzolezzi@herumcrabtree.com'; 'kharrigfeld@herumcrabtree.com'; 'kpoole@nrdc.org'; 'lmasouredis@mwdh2o.com'; Fitzgerald, Martha L.; Melissa Cushman; Michael Edson; Kales, Michelle C.; Mathews, Mark J.; 'mrh@pacificlegal.org'; Mike Sherwood; 'pweiland@nossaman.com'; 'rackroyd@kmtg.com'; 'rthornton@nossaman.com'; Steve Anderson; 'tbrandon@mofo.com'; 'tbrooks@olaughlinparis.com'; 'wsloan@mofo.com'; Strickland, Wes; Bernhardt, David L.
Subject: RE: Consolidated Salmonid Cases, 9th Cir. No. 12-15144 (Cross-Appeal Nos. 12-15289, 12-15290, 12-15291,12-15293, 12-15296)

Agreed as to your conditions. Thanks, Ellen

From: Sims, Steven O. [mailto:SSims@BHFS.com]
Sent: Wednesday, February 27, 2013 2:56 PM
To: Durkee, Ellen (ENRD); Cliff Lee; 'Steven Martin'
Cc: 'agalbraith@herumcrabtree.com'; 'ahuang@nossaman.com'; Allison Goldsmith; 'ameliam@kcwa.com'; 'aremillard@nossaman.com'; 'bmm@pacificlegal.org'; 'bparis@olaughlinparis.com'; 'ccarr@mofo.com'; Cecilia Dennis; 'cmanson@westlandswater.org'; Daniel Harris; 'ddiepenbrock@diepenbrock.com'; 'dobegi@nrdc.org'; 'dohanlon@kmtg.com'; 'emd@diepenbrock.com'; 'etobin@earthjustice.org'; 'ewashburn@mofo.com'; Gregory Wilkinson; Williamson, Geoffrey M.; 'hwalter@kmtg.com'; 'jmarz@diepenbrock.com'; 'jspaletta@herumcrabtree.com'; 'jzolezzi@herumcrabtree.com'; 'kharrigfeld@herumcrabtree.com'; 'kpoole@nrdc.org'; 'lmasouredis@mwdh2o.com'; Fitzgerald, Martha L.; Melissa Cushman; Michael Edson; Kales, Michelle C.; Mathews, Mark J.; 'mrh@pacificlegal.org'; 'msherwood@earthjustice.org'; 'pweiland@nossaman.com'; 'rackroyd@kmtg.com'; 'rthornton@nossaman.com'; Steve Anderson; 'tbrandon@mofo.com'; 'tbrooks@olaughlinparis.com'; 'wsloan@mofo.com'; Strickland, Wes; Bernhardt, David L.
Subject: RE: Consolidated Salmonid Cases, 9th Cir. No. 12-15144 (Cross-Appeal Nos. 12-15289, 12-15290, 12-15291,12-15293, 12-15296)

Ellen-
I have conferred with the Plaintiffs' attorneys and we consent to Federal Defendants and Defendant-Intervenors request for an extension to and including March 20 as long as you specifically state in your request that Federal Defendants and Defendant-Intervenors will not seek further extensions. We also want a May 20 due date for the cross-appellees' reply briefs. We agree to this change in the briefing schedule with the understanding that our agreement does not preclude us from seeking additional extensions if we believe them to be necessary.

Let me know if you have questions.

Steve

Steven O. Sims
Brownstein Hyatt Farber Schreck, LLP
410 Seventeenth Street
Twenty-Second Floor
Denver, Colorado 80202-4437
ssims@bhfs.com
Denver Direct 303.223.1149
New Mexico Direct 505.724.9591
Cell [redacted]

From: Durkee, Ellen (ENRD) [mailto:Ellen.Durkee@usdoj.gov]
Sent: Wednesday, February 27, 2013 11:44 AM
To: Cliff Lee; 'Steven Martin'
Cc: 'agalbraith@herumcrabtree.com'; 'ahuang@nossaman.com'; Allison Goldsmith; 'ameliam@kcwa.com';

'aremillard@nossaman.com'; 'bmm@pacificlegal.org'; 'bparis@olaughlinparis.com'; 'ccarr@mofo.com'; Cecilia Dennis; 'cmanson@westlandswater.org'; Daniel Harris; 'ddiepenbrock@diepenbrock.com'; 'dobegi@nrdc.org'; 'dohanlon@kmtg.com'; 'emd@diepenbrock.com'; 'etobin@earthjustice.org'; 'ewashburn@mofo.com'; Gregory Wilkinson; Williamson, Geoffrey M.; 'hwalter@kmtg.com'; 'jmarz@diepenbrock.com'; 'jspaletta@herumcrabtree.com'; 'jzolezzi@herumcrabtree.com'; 'kharrigfeld@herumcrabtree.com'; 'kpoole@nrdc.org'; 'lmasouredis@mwdh2o.com'; Fitzgerald, Martha L.; Melissa Cushman; Michael Edson; Kales, Michelle C.; Mathews, Mark J.; 'mrh@pacificlegal.org'; 'msherwood@earthjustice.org'; 'pweiland@nossaman.com'; 'rackroyd@kmtg.com'; 'rthornton@nossaman.com'; Sims, Steven O.; Steve Anderson; 'tbrandon@mofo.com'; 'tbrooks@olaughlinparis.com'; 'wsloan@mofo.com'; Strickland, Wes; Bernhardt, David L.
Subject: RE: Consolidated Salmonid Cases, 9th Cir. No. 12-15144 (Cross-Appeal Nos. 12-15289, 12-15290, 12-15291,12-15293, 12-15296)

I am writing to ask for your consent to another extension -- to March 20 -- for the filing of Federal Defendants' response/reply brief (that is currently due on March 6). As you know the case is complex and the issues many. The officials that are required to review and approve the draft are unable to complete review in time to allow for a March 6 filing. This has only just become apparent to me and my managers have asked that I seek an extension. In addition, while I may still have to seek an enlargement in size, with additional time we can shorten the draft further, which will benefit the court and parties. (The paradox is true that with more time, a brief can be shorter)

I have not been in contact with intervenor defendants about this request, so I do not know if they will want a comparable extension, but I invite them to let everyone know their position by response to this email.

If this request is unopposed then I will ask the mediator to enter the extension. I will also ask for a May 4 due date for the cross-appellees' reply brief(s) – or another date that suggest. If opposed, we will file a written motion.

Thank you for your understanding.

Best regards,

Ellen J. Durkee
Appellate Section
Environment & Natural Resources Division
Department of Justice
(202) 514-4426

From: Marsh, Michelle I.
Sent: Monday, March 18, 2013 8:25 AM
To: tbirmingham@westlandswater.org; cmanson@westlandswater.org; Bernhardt, David L.; dohanlon@kmtg.com
CC: Mathews, Mark J.; Treece, Lawrence W.
Subject: Westlands Water District v. US - Appeal
Attachments: 20130315 [001-02] Official Caption.pdf; 20130315 [001-03] CFC Docket and Opinion and Order.pdf; 20130315 [001-01] Notice of Docketing.pdf

Gentlemen,
Per Larry Treece, attached please find Notice of Docketing and related documents from the Court regarding the above appeal. Please let me know if you are unable to open the attachments. Thank you.

Michelle I. Marsh
Legal Secretary
Brownstein Hyatt Farber Schreck, LLP
410 Seventeenth Street, Suite 2200
Denver, CO 80202-4432
mmarsh@bhfs.com
tel 303.223.1388
www.bhfs.com

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Official Caption[1]

2013-5069

WESTLANDS WATER DISTRICT,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in No. 12-CV-0012, Chief Judge Emily C. Hewitt.

Authorized Abbreviated Caption[2]

WESTLANDS WATER DISTRICT v US, 2013-5069

[1] Required for use on petitions, formal briefs and appendices, court opinions, and court orders. FRAP 12(a); 32(a).
[2] Authorized for use only on items not requiring the Official Caption as listed in note 1.

United States Court of Appeals for the Federal Circuit
In the United States Court of Federal Claims
Appeal Information Sheet

Assigned to: Chief Judge Emily C. Hewitt

Referred to:

Nature of Suit: 118

Type of Case: Contract - Other (CDA)

WESTLANDS WATER DISTRICT,

Plaintiff,

v.

THE UNITED STATES,

Defendant,

Docket No. 12-12 C.

Cross or Related? No.

Appellant is. Plaintiff.

Date Judgment Entered: January 15, 2013.

Date of Appeal: March 14, 2013.

Fee: $455.00.

See docket sheet for defendant and plaintiff counsel representation information

APPEAL,ECF

US Court of Federal Claims
United States Court of Federal Claims (COFC)
CIVIL DOCKET FOR CASE #: 1:12-cv-00012-ECH
Internal Use Only

WESTLANDS WATER DISTRICT v. USA
Assigned to: Chief Judge Emily C. Hewitt
Cause: 28:1491 Tucker Act

Date Filed: 01/06/2012
Date Terminated: 01/15/2013
Jury Demand: None
Nature of Suit: 118 Contract - Other (CDA)
Jurisdiction: U.S. Government Defendant

Plaintiff

WESTLANDS WATER DISTRICT

represented by **Lawrence W. Treece**
Brownstein, Hyatt & Farber, LLC
410 Seventeenth Street
Suite 2200
Denver, CO 80241
(303) 223-1257
Fax: (303) 223-8057
Email: ltreece@bhfs.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

USA

represented by **Katy Marie Bartelma**
U. S. Department of Justice - Civil Division
Post Office Box 480
Ben Franklin Station
Washington, DC 20044
(202) 307-0159
Email: katy.m.bartelma@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
01/06/2012	1	COMPLAINT against USA (DOI) (Filing fee $350, Receipt number 073204) (Copy Served Electronically on Department of Justice), filed by WESTLANDS WATER DISTRICT.**Answer due by 3/8/2012.**(jtl) (Additional attachment(s) added on 1/9/2012: # 1 Civil Cover Sheet) (jtl).

		(Entered: 01/09/2012)
01/06/2012	2	Rule 7.1 Disclosure Statement, filed by WESTLANDS WATER DISTRICT. (jtl) (Entered: 01/09/2012)
01/06/2012	3	NOTICE of Assignment to Judge Emily C.Hewit. (jtl) (Entered: 01/09/2012)
01/06/2012	4	NOTICE of Designation of Electronic Case. (jtl) (Entered: 01/09/2012)
01/23/2012	5	NOTICE of Indirectly Related Case(s) [11-564], filed by WESTLANDS WATER DISTRICT. (jtl) (Entered: 01/23/2012)
02/07/2012	6	NOTICE of Appearance by Katy Marie Bartelma for USA. (Bartelma, Katy) (Entered: 02/07/2012)
02/15/2012	7	Unopposed MOTION for Extension of Time until 5/7/2012 to File Answer re 1 Complaint,, filed by USA.**Response due by 3/5/2012.**(Bartelma, Katy) (Entered: 02/15/2012)
02/15/2012	8	ORDER granting 7 Motion for Extension of Time to Answer. **Answer due by 5/7/2012.** Signed by Chief Judge Emily C. Hewitt. (dp) Copy to parties. (Entered: 02/15/2012)
04/25/2012	9	MOTION for Extension of Time until 5/21/12 to to Repond to Complaint, filed by USA.**Response due by 5/14/2012.**(Bartelma, Katy) (Entered: 04/25/2012)
04/26/2012	10	RESPONSE to 9 MOTION for Extension of Time until 5/21/12 to to Repond to Complaint, filed by WESTLANDS WATER DISTRICT.**Reply due by 5/7/2012.** (Treece, Lawrence) (Entered: 04/26/2012)
04/26/2012	11	ORDER granting 9 Motion for Extension of Time. **Answer due by 5/21/2012.** Signed by Chief Judge Emily C. Hewitt. (dp) Copy to parties. (Entered: 04/26/2012)
04/26/2012		(Court only) Set/Reset Deadlines: Answer due by 5/21/2012. (jtl) (Entered: 04/26/2012)
05/21/2012	12	MOTION to Dismiss pursuant to Rules 12(b)(1) and (6), filed by USA.**Response due by 6/21/2012.** (Attachments: # 1 Appendix Part 1, # 2 Appendix Part 2)(Bartelma, Katy) (Entered: 05/21/2012)
05/31/2012	13	ORDER **Courtesy Copy of Appendix to Defendant's Motion to Dismiss due by 6/6/2012.** Signed by Chief Judge Emily C. Hewitt. (dp) Copy to parties. (Entered: 05/31/2012)
05/31/2012	14	Unopposed MOTION for Extension of Time until 08/20/2012 to File Response as to 12 MOTION to Dismiss pursuant to Rules 12(b)(1) and (6) *and for Leave to Exceed the Page Limit*, filed by WESTLANDS WATER DISTRICT.**Response due by 6/18/2012.**(Treece, Lawrence) (Entered: 05/31/2012)
06/01/2012	15	ORDER granting 14 Motion for Extension of Time to File Response. **Response due by 8/20/2012.** Signed by Chief Judge Emily C. Hewitt. (dp)

		Copy to parties. (Entered: 06/01/2012)
08/07/2012	16	ORDER **Notice of Compliance due by 8/20/2012.** Signed by Chief Judge Emily C. Hewitt. (dp) Copy to parties. (Entered: 08/07/2012)
08/16/2012	17	NOTICE, filed by WESTLANDS WATER DISTRICT re 16 Order *of Compliance* (Attachments: # 1 Appendix A pt. 1, # 2 Appendix A pt. 2, # 3 Appendix A pt. 3, # 4 Appendix A pt. 4, B pt. 1, # 5 Appendix B pt. 2) (Treece, Lawrence) (Entered: 08/16/2012)
08/20/2012	18	RESPONSE to 12 MOTION to Dismiss pursuant to Rules 12(b)(1) and (6), filed by WESTLANDS WATER DISTRICT.**Reply due by 9/7/2012.** (Attachments: # 1 Appendix pt. 1, # 2 Appendix pt. 2, # 3 Appendix pt. 3, # 4 Appendix pt. 4)(Treece, Lawrence) (Entered: 08/20/2012)
08/20/2012	19	NOTICE, filed by WESTLANDS WATER DISTRICT re 18 Response to Motion [Dispositive], Response to Motion [Dispositive] *of Request for Judicial Notice in Support of Westlands Water District's Response to Defendant's Motion to Dismiss* (Attachments: # 1 Affidavit of Stephanie Ball)(Treece, Lawrence) (Entered: 08/20/2012)
08/22/2012	20	STATUS CONFERENCE ORDER: **Status Conference set for 8/22/2012 04:30 PM EDT, 02:30 PM MDT in Chambers (Telephonic) before Chief Judge Emily C. Hewitt.** Signed by Chief Judge Emily C. Hewitt. (dp) Copy to parties. (Entered: 08/22/2012)
08/22/2012		Minute Entry for proceeding held in Washington, DC on 8/22/2012 for 25 minutes before Chief Judge Emily C. Hewitt: Telephonic Status Conference. [Total number of days of proceeding: 1]. Official Record of proceeding taken via electronic digital recording (EDR). (Click HERE for link to Court of Federal Claims web site forms page for information on ordering: certified transcript from reporter or certified transcript of proceeding from official digital recording.)(dp) (Entered: 08/22/2012)
08/23/2012	21	ORDER Signed by Chief Judge Emily C. Hewitt. (dp) Copy to parties. (Entered: 08/23/2012)
08/24/2012	22	Unopposed MOTION for Extension of Time until 10/5/12 to File Reply, filed by USA.**Response due by 9/10/2012.**(Bartelma, Katy) (Entered: 08/24/2012)
08/27/2012	23	ORDER granting 22 Motion for Extension of Time to File Reply. **Reply due by 10/5/2012.** Signed by Chief Judge Emily C. Hewitt. (dp) Copy to parties. (Entered: 08/27/2012)
08/31/2012	24	NOTICE, filed by WESTLANDS WATER DISTRICT re 21 Order *of filing Westlands Water District's Response to Court's August 23, 2012 Order Requesting Complete Copies of the Fifteen Documents Listed in Plaintiff's Request for Judicial Notice* (Attachments: # 1 Exhibit 1-3, # 2 Exhibit 4-7, # 3 Exhibit 8-13, # 4 Exhibit 14-16)(Treece, Lawrence) (Entered: 08/31/2012)
09/10/2012	25	NOTICE, filed by USA re 21 Order (Bartelma, Katy) (Entered: 09/10/2012)

09/11/2012	26	NOTICE, filed by WESTLANDS WATER DISTRICT re 25 Notice (Other) *of Westlands Water District's Reply to Defendant's Notice Pursuant to Court's August 23, 2012 Order* (Treece, Lawrence) (Entered: 09/11/2012)
09/14/2012	27	ORDER **regarding notices filed by the parties. Corrected Appendix in Support of Response to Motion to Dismiss and corrected Response to Motion to Dismiss due by 9/26/2012.** Signed by Chief Judge Emily C. Hewitt. (lo) Copy to parties. (Entered: 09/14/2012)
09/26/2012	28	NOTICE, filed by WESTLANDS WATER DISTRICT re 27 Order, (Treece, Lawrence) (Entered: 09/26/2012)
09/26/2012	29	RESPONSE to 27 Order,, filed by WESTLANDS WATER DISTRICT. (Attachments: # 1 Appendix Part 1, # 2 Appendix Part 2, # 3 Appendix Part 3, # 4 Appendix Part 4, # 5 Appendix Part 5, # 6 Appendix Part 6, # 7 Appendix Part 7)(Treece, Lawrence) (Entered: 09/26/2012)
09/27/2012	30	Unopposed MOTION for Extension of Time until 10/12/12 to File Reply as to 12 MOTION to Dismiss pursuant to Rules 12(b)(1) and (6), filed by USA.**Response due by 10/15/2012.**(Bartelma, Katy) (Entered: 09/27/2012)
09/27/2012	31	ORDER granting 30 Motion for Extension of Time to File Reply. **Reply due by 10/12/2012.** Signed by Chief Judge Emily C. Hewitt. (lo) Copy to parties. (Entered: 09/27/2012)
10/12/2012	32	REPLY to Response to Motion re 12 MOTION to Dismiss pursuant to Rules 12(b)(1) and (6), filed by USA. (Bartelma, Katy) (Entered: 10/12/2012)
01/15/2013	33	PUBLISHED OPINION granting 12 Motion to Dismiss - Rule 12(b)(1) and (6). The Clerk is directed to enter judgment. Signed by Chief Judge Emily C. Hewitt. (lo) Copy to parties. (Entered: 01/15/2013)
01/15/2013	34	JUDGMENT entered pursuant to Rule 58, that the complaint is dismissed. (Copy to parties) (lld) (Entered: 01/15/2013)
01/15/2013		(Court only) ***Civil Case Terminated. (lld) (Entered: 01/15/2013)
03/14/2013	35	NOTICE OF APPEAL as to 34 Judgment, 33 Order on Motion to Dismiss - Rule 12(b)(1) and (6), Published Opinion/Order, filed by WESTLANDS WATER DISTRICT. Filing fee $ 455, receipt number 9998-2009184. Copies to judge, opposing party and CAFC. (Treece, Lawrence) (Entered: 03/14/2013)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

(Electronically filed on March 14, 2013)

WESTLANDS WATER DISTRICT

v.

THE UNITED STATES

No. 1:12-cv-00012-ECH

Chief Judge Emily C. Hewitt

WESTLANDS WATER DISTRICT'S NOTICE OF APPEAL

Pursuant to Fed. R. App. P. 3 and Fed. Cl. R. 58.1, Plaintiff Westlands Water District gives notice that it appeals to the United States Court of Appeals for the Federal Circuit from the entire Opinion and Order, Dkt.. No. 33, and Judgment, Dkt. No. 34, dismissing Westlands' Complaint, entered on January 15, 2013.

Dated: March 14, 2013.

Brownstein Hyatt Farber Schreck, LLP

s/ *Lawrence W. Treece*

Lawrence W. Treece
Mark J. Mathews
Lauren E. Schmidt
410 17th Street
Suite 2200
Denver, Colorado 80202
Tele: 303.223.1100
Fax: 303.223.8057
Email: ltreece@bhfs.com
mmathews@bhfs.com
lschmidt@bhfs.com

and

David L. Bernhardt
1350 I Street, NW
Suite 510
Washington, DC 20005
Tele: 202.296.7353
Fax:: 202.296.7009
Email: dbernhardt@bhfs.com
ATTORNEYS FOR PLAINTIFF

In the United States Court of Federal Claims

No. 12-12 C

(E-Filed: January 15, 2013)

WESTLANDS WATER DISTRICT, Plaintiff, v. THE UNITED STATES, Defendant.	Breach of Contract Claims; Declaratory Judgment; Motion to Dismiss Under RCFC 12(b)(1) and 12(b)(6)

Lawrence W. Treece, Denver, CO, for plaintiff. Mark J. Mathews and Lauren E. Schmidt, Denver, CO, and David L. Bernhardt, Washington, DC, of counsel.

Katy M. Bartelma, Trial Attorney, with whom were Stuart F. Delery, Acting Assistant Attorney General, Jeanne E. Davidson, Director, and Bryant G. Snee, Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant. Shelly Randel and Amy Aufdemberge, Office of the Solicitor, United States Department of the Interior, Washington, DC, of counsel.

OPINION AND ORDER

HEWITT, Chief Judge

Westlands Water District (plaintiff or Westlands), a water district in the state of California, buys and distributes water from the San Luis unit of the Central Valley project, which is administered by the Bureau of Reclamation of the Department of the Interior (Interior). Compl., Docket Number (Dkt. No.) 1, ¶¶ 2, 5, 12. Westlands brings this action alleging various breaches of a purported contractual obligation of the United States government (defendant or the government) to provide drainage to Westlands, based on the government's failure to provide water drainage facilities and services. See id. ¶¶ 5-7.

Specifically, plaintiff states six claims for relief. The first two claims present alternative breach of contract theories: (1) past breaches of express contractual drainage obligations, Compl. ¶¶ 131-36; or, in the alternative, (2) past breaches of implied contractual drainage obligations, id. ¶¶ 137-42. The third, fourth and fifth claims are dependent on the court's finding a contractual duty to provide drainage: (3) past breaches of implied contractual obligations of good faith and fair dealing, id. ¶¶ 143-50; (4) total breach of contract regarding drainage obligations, id. ¶¶ 151-56; and (5) anticipatory breach of contract regarding drainage obligations, id. ¶¶ 157-63. Finally, plaintiff states an alternate claim for relief, should the court find neither a total nor anticipatory breach of contract, as alleged in claims four and five, respectively: (6) declaratory judgment adjusting any amounts due by Westlands pursuant to present and future repayment contracts so that Westlands will not have to repay the government higher actual costs of construction under those contracts, as a result of inflation, than it would have had to pay if construction had not been delayed. Id. ¶¶ 164-76. In connection with (and as a condition of) its claims for total breach and anticipatory breach, plaintiff also seeks a declaration of the severability of defendant's contractual obligation to provide water service from defendant's purported contractual obligation to provide drainage. Id. ¶¶ 156, 163; Corrected Response to Motion to Dismiss (plaintiff's Response or Pl.'s Resp.), Dkt. No. 29, at 46.

Now before the court, in addition to plaintiff's Complaint, are: Defendant's Motion to Dismiss, (defendant's Motion or Def.'s Mot.), Dkt. No. 12, filed May 21, 2012, and Appendix to Defendant's Motion to Dismiss (defendant's Appendix or Def.'s App.), Dkt. Nos. 12-1,-2; plaintiff's Response to Motion to Dismiss, Dkt. No. 18, filed August 20, 2012, which was superseded by plaintiff's Response, filed September 26, 2012; and Defendant's Reply in Support of Our Motion to Dismiss (defendant's Reply or Def.'s Reply), Dkt. No. 32, filed October 12, 2012. Plaintiff also filed an Appendix in Support of Response to Motion to Dismiss, Dkt. Nos. 18-1 to 18-4, filed Aug. 20, 2012, which was superseded by plaintiff's Appendix in Support of Corrected Response to Motion to Dismiss (plaintiff's Appendix or Pl.'s App.), Dkt. Nos. 29-1 to 29-7, filed September 26, 2012.

Defendant argues that all six of plaintiff's claims must be dismissed pursuant to Rule 12 of the Rules of the United States Court of Federal Claims (RCFC), asserting that, under RCFC 12(b)(1), this court lacks jurisdiction over all of plaintiff's claims except claim five (anticipatory breach) and that, under RCFC 12(b)(6), plaintiff has failed to state a claim upon which relief can be granted with respect to all six claims. Def.'s Mot. 1.

For the reasons set forth below, defendant's Motion is GRANTED.

I. Background[1]

A. Creation of the San Luis Unit as Part of the Federal Reclamation Program

1. Relevant Federal Reclamation Laws[2]

In 1902, Congress created a "'reclamation fund'" in the Treasury--to be funded by public land sales--for "the construction and maintenance of irrigation works" to reclaim arid and semiarid lands in the western United States for productive use. Reclamation Act of 1902 (1902 Act), ch. 1093, § 1, 32 Stat. 388 (codified as amended in scattered sections of 43 U.S.C.). The Secretary of the Interior (the Secretary) received authority to contract for construction of such irrigation projects and to pay for them out of the newly created reclamation fund. Id. § 4, 32 Stat. at 389. However, these expenditures were meant to be reimbursed: pursuant to the 1902 Act, equitably apportioned charges would be levied upon irrigated lands "with a view of returning to the reclamation fund the estimated cost of construction of the project." Id. After a "major portion" of the construction costs were paid, "management and operation of [the] irrigation works" would then "pass to the owners of the [irrigated] lands." Id. § 6, 32 Stat. at 389. "[T]itle to and the management and operation of the reservoirs . . . [would] remain in the Government until otherwise provided by Congress." Id., 32 Stat. at 389.

Congress supplemented the 1902 Act with the Reclamation Project Act of 1939 (1939 Act), ch. 418, 53 Stat. 1187 (codified as amended at 43 U.S.C. §§ 485-485k (2006)), "to provide a feasible and comprehensive plan for the variable payment of construction charges on United States reclamation projects," id. § 1, 53 Stat. at 1187. Specifically, the 1939 Act described two different contract schemes: repayment contracts and water service contracts. Id. § 9(d)-(e), 53 Stat. at 1195-96 (codified as amended at 43 U.S.C. § 485h(d)-(e)). Generally, organizations contracting for water would be required to enter a repayment contract with the United States before any water could "be delivered for irrigation of lands in connection with any new project." Id. § 9(d), 53 Stat. at 1195. These repayment contracts would treat actual construction costs allocated to irrigation as "a general repayment obligation" to the United States. Id. § 9(d)(3), 53 Stat. at 1195. Repayment would "be spread in annual installments, of the number and amounts fixed by the Secretary, over a period not exceeding forty years." Id. "[T]he first annual

[1] A table of contents appears at the end of this Opinion as Exhibit A.

[2] In describing the history of federal reclamation laws, the court cites to the applicable session laws. However, in analyzing plaintiff's claims under current federal reclamation laws, the court cites to the relevant provisions as amended and codified in the United States Code. The history of the federal reclamation program is also addressed briefly in Defendant's Motion to Dismiss (defendant's Motion or Def.'s Mot.), Docket Number (Dkt. No.) 12, at 2-3.

installment for any project contract unit" would accrue "on the date fixed by the Secretary, [either] in the year after the last year of the development period," or if there was no development period, "in the calendar year after the Secretary announce[d] that the construction contemplated in the repayment contract is substantially completed or . . . advanced to a point where delivery of water can be made to substantially all of the lands" in the contract unit. Id. § 9(d)(4), 53 Stat. at 1196.

In addition, the Secretary had discretion under the 1939 Act to enter water service "contracts to furnish water for irrigation purposes" for up to a forty-year period, "at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper." Id. § 9(e), 53 Stat. at 1196. Under a water service contract, payments would be due in advance of water delivery. Id. "[T]he costs of any irrigation water distribution works constructed by the United States in connection with the new project" would be covered by a separate repayment contract. Id.

2. Construction of the San Luis Unit

Congress authorized the Secretary to construct the San Luis unit of the Central Valley project by passing the San Luis Act of 1960 (San Luis Act), Pub. L. No. 86-488, 74 Stat. 156; see Compl. ¶ 18. The San Luis unit was created with the "principal purpose of furnishing water for the irrigation of approximately five hundred thousand acres of land in Merced, Fresno, and Kings Counties, California." San Luis Act § 1(a), 74 Stat. at 156. As "an integral part of the Central Valley project," it would be subject to federal reclamation laws with respect to its construction, operation and maintenance. Id.

Under the terms of the San Luis Act, one condition precedent to construction of the San Luis unit was that the Secretary must have made adequate drainage provisions for the unit, either by securing a commitment from the State of California to provide for a master drainage outlet or by providing for construction of an interceptor drain by the federal government. See id. (stating that construction shall not commence until the Secretary has "received satisfactory assurance from the State of California that it will make provision for a master drainage outlet and disposal channel for the San Joaquin Valley, . . . which will adequately serve, by connection therewith, the drainage system for the San Luis unit or has made provision for constructing the San Luis interceptor drain to the delta designed to meet the drainage requirements of the San Luis unit"); Compl. ¶ 18. Initially, the State of California planned to collaborate with the federal government on a master drainage outlet to serve "the drainage needs of the San Luis Unit and other surrounding areas." Compl. ¶ 51. However, when the State of California later notified Interior that it would not construct a master drainage outlet, Interior agreed to construct an interceptor drain. Id. ¶¶ 19, 51; Def.'s Mot. 7.

Westlands began receiving water from the San Luis unit in late 1967. Compl. ¶ 20; Def.'s Mot. 5.

Construction of an interceptor drain began in 1968. Def.'s Mot. 7; see Compl. ¶ 51. The purpose of the interceptor drain was to receive drainage from local drainage systems, which it would then empty into the Sacramento/San Joaquin River Delta. Compl. ¶ 50; Def.'s Mot. 7. By 1975, less than half of the planned length of the interceptor drain had been completed, with the drain ending at the Kesterson Reservoir, about sixty miles north of Westlands. Compl. ¶ 51; Def.'s Mot. 7. The interceptor drain was never extended as planned; Interior suspended construction in 1975 owing to environmental concerns. Compl. ¶ 51; Def.'s Mot. 7.

Around that time, Interior began construction of a subsurface drainage system for Westlands, which was connected to the completed portion of the interceptor drain. Def.'s Mot. 7; see Compl. ¶ 52. Beginning in 1979 and continuing through 1985, this drainage system transported drainage from Westlands to the Kesterson Reservoir. Compl. ¶ 58; Def.'s Mot. 7. However, environmental concerns arose after high levels of selenium (a mineral contained in the drainage water) were found in ducks and embryonic deformities were found in shore birds at the Kesterson Reservoir. Compl. ¶¶ 60-61; see Def.'s Mot. 7. As a result, Westlands and Interior signed an agreement in 1985 to discontinue the flow of drainage water to the Kesterson Reservoir, and the Kesterson Reservoir and completed portion of the interceptor drain were closed. Compl. ¶¶ 64-65; Def.'s Mot. 7-8. The government has not provided for drainage from the Westlands water district "since the spring of 1986[,] when Westlands' drainage collector drains were plugged." Compl. ¶ 67.

Westlands continues to receive water pursuant to water service contracts with the government. See Def.'s Mot. 8 ("Westlands continues to receive [Central Valley Project] water."); Pl.'s App. 9-39 (2012 interim renewal contracts) (providing for water service into 2014).

B. Contracts at Issue Between Westlands and the United States Government[3]

[3] The United States (defendant or the government) points out that Westlands Water District (plaintiff or Westlands) does not allege a breach of the 1985 agreement between plaintiff and defendant, see Def.'s Mot. 15 n.5, in which the parties agreed to discontinue the flow of drainage water to the Kesterson Reservoir, Compl. ¶ 65. The court agrees and does not consider whether the government breached any obligations under the 1985 agreement. Cf. Corrected Resp. to Mot. to Dismiss (plaintiff's Response or Pl.'s Resp.), Dkt. No. 29, at 1 n.1 (listing contracts "involved in this litigation" and not including the 1985 agreement in the list).

In addition, plaintiff appears to raise for the first time in its Response an allegation that the government has also breached obligations under a series of 2012 interim renewal contracts.

1. 1963 Water Service Contract

In 1963, Westlands signed a water service contract with Interior, pursuant to federal reclamation laws. Compl. ¶¶ 29-30; Def.'s Mot. 5; see Def.'s App. A2-43 (Contract Between the United States and Westlands Water District Providing for Water Service (1963 Contract)).[4] As a water service contract, the 1963 Contract is governed by 43 U.S.C. § 485h(e), where section 9(e) of the 1939 Act has been codified. See Def.'s Mot. 3, 5. Accordingly, rates under the 1963 Contract reflected the Secretary's judgment that such rates "will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper." 1939 Act § 9(e), 53 Stat. at 1196 (codified as amended at 43 U.S.C. § 485h(e)).

The 1963 Contract provided that "the United States [would] furnish to [Westlands] and [Westlands] each . . . year [would] accept and pay . . . for water from the

---

See Pl.'s Resp. 16 (mentioning "an array of interim renewal contracts in 2012" and stating that these contracts "incorporated the terms of the 'Existing Interim Renewal Contract'" and did not purport "to abrogate the obligation to provide drainage"); id. at 1 n.1 (listing the 2012 interim contracts as contracts involved in the litigation); see also App. in Supp. of Corrected Resp. to Mot. to Dismiss (plaintiff's Appendix or Pl.'s App.), Dkt. Nos. 29-1 to 29-7, at 9-39 (2012 interim renewal contracts). Plaintiff made no mention of the 2012 interim contracts in its Complaint, see Compl., Dkt. No. 1, ¶¶ 41-47 (discussing interim renewal contracts for 2007 and 2010 only), and plaintiff's attempt to extend its claims beyond the scope of its Complaint is improper, see Rules of the United States Court of Federal Claims (RCFC) 15(a) (governing amendments to the pleadings and stating that, when (as here) an amendment is not allowed as a matter of course, "a party may amend its pleading only with the opposing party's written consent or the court's leave"); see also Def.'s Reply in Supp. of Our Mot. to Dismiss (Def.'s Reply), Dkt. No. 32, at 13 n.9 (stating that plaintiff's attempt to expand the scope of the pleadings is improper). If plaintiff seeks to include the 2012 interim renewal contracts in its Complaint, it must amend its Complaint pursuant to Rule 15 of the RCFC. Cf. RCFC 15(a). Because plaintiff has not done so, the court does not consider whether defendant has breached any obligations arising out of the 2012 interim renewals contracts. Nonetheless, as defendant notes, see Def.'s Reply 13 n.9, because the 2012 interim renewal contracts incorporate the terms of the previous interim renewal contracts, see Pl.'s Resp. 16, the analysis with respect to such a claim would likely be the same as for the interim renewal contracts for 2007 and 2010, see infra Parts III.A.1.a.iii-iv (analyzing 2007 and 2010 interim renewal contracts).

[4] The Contract Between the United States and Westlands Water District Providing for Water Service (1963 Contract) is also reprinted in plaintiff's Appendix as Exhibit A to the Judgment in Barcellos & Wolfsen, Inc. v. Westlands Water District, Nos. CV 79-106-EDP & CV F-81-245-EDP (E.D. Cal. Dec. 30, 1986) (Barcellos Judgment). See Pl.'s App. 223-65 (1963 Contract).

San Luis Unit." Def.'s App. A9 (1963 Contract). In the contract, the Secretary set a rate of payment for operation, maintenance and other fixed charges not to exceed eight dollars per acre-foot[5] of water, including a drainage service component not to exceed fifty cents per acre-foot of water. Id. at A15. Further, the 1963 Contract obligated Westlands to "construct such drainage works as are necessary to protect the irrigability of lands within [Westlands water district]." Id. at A25. These local drainage facilities of Westlands were permitted to "be connected to the interceptor drain in such capacity and at such locations as may be mutually agreed upon between [Westlands] and the United States." Id. at A12.

The 1963 Contract was effective from 1967, when Westlands began receiving water from the San Luis unit, until December 31, 2007. Compl. ¶¶ 20, 33; Def.'s Mot. 5; see Def.'s App. A7-8 (1963 Contract) (defining "initial delivery date" and stating that the contract was to "remain in effect for a period of forty (40) years commencing with the year in which the earliest initial delivery date of the long-term contracts for water service from the San Luis Unit shall occur").

2. 1965 Repayment Contract

As required by federal reclamation laws, the parties entered into a repayment contract, see Def.'s App. A127-70 (Contract Between the United States and Westlands Water District Providing for the Construction of a Water Distribution and Drainage Collector System (1965 Repayment Contract)),[6] for "the construction of a water distribution and drainage collector system," id. at A127, A129 (capitalization omitted); see Compl. ¶¶ 29, 37; Def.'s Mot. 6. As a repayment contract, the 1965 Repayment Contract is governed by 43 U.S.C. § 485h(d), where section 9(d) of the 1939 Act has been codified. See Def.'s Mot. 6. A separate repayment contract was necessary--in addition to a water service contract, which covered costs of operation and maintenance--because under the 1939 Act, "the costs of any irrigation water distribution works constructed by the United States in connection with [a] new project [covered by a water service contract]" were to be covered by a separate repayment contract. 1939 Act § 9(e),

[5]An acre-foot is "[a] volume measurement in irrigation, equal to the amount of water that will cover one acre of land in one foot of water (325,850 gallons)." Black's Law Dictionary (9th ed. 2009); Def.'s Mot. 4 n.3.

[6] The Contract Between the United States and Westlands Water District Providing for the Construction of a Water Distribution and Drainage Collector System (1965 Repayment Contract) is also reprinted in plaintiff's Appendix as Exhibit B to the Barcellos Judgment. See Pl.'s App. 279-316 (1965 Repayment Contract). The maps that have been omitted from Exhibit B to the Barcellos Judgment, see id. at 316, appear in defendant's version of the 1965 Repayment Contract, see App. to Def.'s Mot. to Dismiss (Def.'s App.), Dkt. Nos. 12-1,-2, at A163-70 (1965 Repayment Contract).

53 Stat. at 1196 (codified as amended at 43 U.S.C. § 485h(e)). Accordingly, the 1965 Repayment Contract provided for repayment by Westlands of the actual construction costs of the San Luis unit, see Def.'s App. A134 (1965 Repayment Contract), whereas the 1963 Contract provided for annual payment of estimated operation and maintenance costs and other fixed charges, see supra Part. I.B.1.

Specifically, the 1965 Repayment Contract provided that "[t]o the extent that funds [were then] or [t]hereafter [would] be available . . . , the United States [would] expend toward construction of a distribution system" up to $157,048,000. Def.'s App. A131 (1965 Repayment Contract). Westlands, in turn, agreed to "repay to the United States the actual cost of the distribution system constructed and acquired pursuant to [the 1965 Repayment Contract]," up to $157,048,000. Id. at A134-35. "The actual construction cost of the distribution system to be repaid to the United States by [Westlands] . . . embrace[d] all expenditures by the United States," which included "the cost of labor, material, equipment, engineering and legal work, superindence, administration and overhead, rights-of-way, property, . . . damage of all kinds, and . . . all sums expended by the Bureau of Reclamation in surveys and investigations in connection with the distribution system." Id. at A146. The contracting officer's "determination of what costs [were] properly chargeable" under the contract, and in what amounts, was to be conclusive. Id. The government and Westlands were required to "exert their best efforts to expedite the completion" of the distribution system. Id. at A132.

The 1965 Repayment Contract provided that the distribution system facilities would be constructed in three construction phases. Id. at A132-33; see Compl. ¶ 39. As required by federal reclamation law, see 1939 Act § 9(d)(3)-(4), 53 Stat. at 1195-96 (codified as amended at 43 U.S.C. § 485h(d)(3)-(4)), the actual construction costs for each phase would be paid by Westlands over a forty-year period, interest-free, beginning in the year following completion of the phase, see Def.'s App. A135 (1965 Repayment Contract); Compl. ¶ 37; Def.'s Mot. 6. Westlands began making payments pursuant to the 1965 Repayment Contract in or about 1979, Compl. ¶ 40; see id. ¶ 53, when the first phase of the subsurface drainage system connecting Westlands to the interceptor drain was completed, see id. ¶ 52. The other phases of construction were not completed after the government determined in or about 1978--incorrectly, according to plaintiff--that funds were insufficient. Id. ¶¶ 54-55. The 1965 Repayment Contract remains in force. See Def.'s App. A135-36 (1965 Repayment Contract) (describing forty-year term for payments); Pl.'s Resp. 14 ("The 1965 [Repayment] Contract does not expire until forty years after Westlands began making payments in 1979.").

3. 2007 Interim Water Service Contract

In 2007, the parties signed an interim water service renewal contract.[7] Compl. ¶¶ 29, 41; Def.'s Mot. 6; see Def.'s App. A44-120 (Interim Renewal Contract Between the United States and Westlands Water District Providing for Project Water Service San Luis Unit and Delta Division (2007 Interim Contract)). The 2007 Interim Contract provided that "the Contracting Officer [would] make available for delivery to [Westlands] 1,150,000 acre-feet of [Central Valley] Project Water for irrigation and [municipal and industrial] purposes" during each year of the 2007 Interim Contract. Def.'s App. A58 (2007 Interim Contract). Water delivered pursuant to the 2007 Interim Contract was to be paid for in accordance with the Secretary of the Interior's 1988 ratesetting policy for irrigation water and then-existing ratesetting policy for municipal and industrial water. Id. at A69; see id. at A112 (2007 Interim Contract Ex. B (2007 rates and charges)).

With respect to drainage, the 2007 Interim Contract provided that "[t]he Contracting Officer [would] notify [Westlands] in writing when drainage service [became] available," and that "the Contracting Officer [would thereafter] provide drainage service to [Westlands] at rates established pursuant to the then-existing ratesetting policy for Irrigation Water." Id. at A82 (2007 Interim Contract); see id. at A112 (2007 Interim Contract Ex. B (2007 rates and charges)).

The 2007 Interim Contract was effective from January 1, 2008 to February 28, 2010. Id. at A56 (2007 Interim Contract); Compl. ¶ 41; Def.'s Mot. 6.

4. 2010 Interim Water Service Contract

In 2010, the parties signed a second interim water service renewal contract. Compl. ¶ 45; Def.'s Mot. 6; see Def.'s App. A121-26 (Interim Renewal Contract Between the United States and Westlands Water District Providing for Project Water Service (2010 Interim Contract)). The 2010 Interim Contract incorporated the terms and conditions of the 2007 Interim Contract. See Def.'s App. A122 (2010 Interim Contract); Compl. ¶ 46; Def.'s Mot. 6. It was effective from March 1, 2010 through February 29, 2012 and contained provisions for renewal if "a long-term renewal contract has not been executed with an effective commencement date of March 1, 2012." Def.'s App. A123 2010 Interim Contract).

II. Legal Standards

[7] Although the 1963 Contract contemplated a long-term extension, see Def.'s App. A8 (1963 Contract), no long-term extension was entered into because certain environmental requirements imposed by the Central Valley Project Improvement Act, Pub. L. No. 102-575, § 3404(c)(1), 106 Stat. 4600, 4708-09 (1992), were not met, see Compl. ¶¶ 41, 45; Def.'s Mot. 6 n.4.

A. Jurisdiction

Subject matter jurisdiction is a threshold matter that a court must determine at the outset of a case. See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998); PODS, Inc. v. Porta Stor, Inc., 484 F.3d 1359, 1365 (Fed. Cir. 2007). Pursuant to the Tucker Act, the United States Court of Federal Claims (Court of Federal Claims) has jurisdiction over "any claim against the United States founded . . . upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States." 28 U.S.C. § 1491(a)(1) (2006). The Tucker Act serves as a waiver of sovereign immunity and a jurisdictional grant, but it does not create a substantive cause of action. Jan's Helicopter Serv., Inc. v. Fed. Aviation Admin., 525 F.3d 1299, 1306 (Fed. Cir. 2008). A plaintiff must, therefore, "'identify a separate source of substantive law that creates the right to money damages.'" Id. (quoting Fisher v. United States, 402 F.3d 1167, 1172 (Fed. Cir. 2005) (en banc in relevant part)).

The court's six-year statute of limitations, a condition on the Tucker Act's waiver of sovereign immunity, further limits the court's jurisdiction. See Martinez v. United States, 333 F.3d 1295, 1316 (Fed. Cir. 2003) (en banc) ("It is well established that statutes of limitations for causes of action against the United States, being conditions on the waiver of sovereign immunity, are jurisdictional in nature."); see also Soriano v. United States, 352 U.S. 270, 276 (1957) (stating that the United States Supreme Court "has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed"). Because the statute of limitations in this court is jurisdictional, Martinez, 333 F.3d at 1316, it cannot be waived, see John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 134-35 (2008) (noting the "absolute nature" of "jurisdictional" limitations statute for this court).

The statute of limitations provides that claims over which the Court of Federal Claims would otherwise have jurisdiction "shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501 (2006). A breach of contract claim first accrues when a plaintiff has fully performed its obligations under the contract--entitling the plaintiff to performance by the defendant--but the defendant has failed to perform. See Oceanic Steamship Co. v. United States, 165 Ct. Cl. 217, 225 (1964) (per curiam) (reprinting opinion and recommendation of trial commissioner, adopted as supplemented) ("[W]here a claim is based upon a contractual obligation of the Government to pay money, the claim first accrues on the date when the payment becomes due and is wrongfully withheld in breach of the contract."); accord Kinsey v. United States, 852 F.2d 556, 557 (Fed. Cir. 1988); see also Brighton Vill. Assocs. v. United States, 52 F.3d 1056, 1060 (Fed. Cir. 1995) (stating that "[a] claim accrues when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action" (internal quotation marks omitted)). However, the continuing claim doctrine "permits separate causes of action to accrue each time a plaintiff suffers damage

which is the 'result of [a] new and independent breach[] by the government.'" Banks v. United States, 88 Fed. Cl. 665, 679 (2009) (alterations in original) (quoting Boling v. United States, 220 F.3d 1365, 1374 (Fed. Cir. 2000)).

In considering a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the RCFC, as with a motion to dismiss pursuant to Rule 12(b)(6), the court must accept as true all undisputed allegations of fact made by the non-moving party and draw all reasonable inferences from those facts in the non-moving party's favor. See Trusted Integration, Inc. v. United States, 659 F.3d 1159, 1163 (Fed. Cir. 2011) (citing Henke v. United States, 60 F.3d 795, 797 (Fed. Cir. 1995)). However, "[w]hen a party challenges the jurisdictional facts alleged in the complaint, the court may consider relevant evidence outside the pleadings to resolve the factual dispute." Arakaki v. United States, 62 Fed. Cl. 244, 247 (2004) (citing Reynolds v. Army & Air Force Exch. Serv., 846 F.2d 746, 747 (Fed. Cir. 1988) & Indium Corp. of Am. v. Semi-Alloys, Inc., 781 F.2d 879, 884 (Fed. Cir. 1985)). If the court determines that it does not have jurisdiction, it must dismiss the claim. See RCFC 12(h)(3). The burden is on the plaintiff to show jurisdiction by a preponderance of the evidence. Taylor v. United States, 303 F.3d 1357, 1359 (Fed. Cir. 2002).

B. Failure to State a Claim

A motion to dismiss pursuant to RCFC 12(b)(6)[8] asserts a "failure to state a claim upon which relief can be granted." RCFC 12(b)(6). To survive a Rule 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal (Iqbal), 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly (Twombly), 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (citing Twombly, 550 U.S. at 556). This means that the complaint must "raise a right of relief above the speculative level." See Twombly, 550 U.S. at 555.

When ruling on a Rule 12(b)(6) motion to dismiss, the court "must accept as true all the factual allegations in the complaint." Sommers Oil Co. v. United States (Sommers Oil), 241 F.3d 1375, 1378 (Fed.Cir. 2001). Further, "in addition to the complaint . . . and exhibits thereto, the court 'must consider . . . documents incorporated into the complaint

[8] The RCFC generally mirror the Federal Rules of Civil Procedure (FRCP). See C. Sanchez & Son, Inc. v. United States, 6 F.3d 1539, 1541 n.2 (Fed. Cir. 1993) (stating that "[t]he [RCFC] . . . generally follow the [FRCP]"); RCFC 2002 Rules Committee Note ("[I]nterpretation of the court's rules will be guided by case law and the Advisory Committee Notes that accompany the Federal Rules of Civil Procedure."). Rule 12 of the RCFC is substantially identical to Rule 12 of the FRCP. Compare RCFC 12, with FRCP 12. Therefore, the court relies on cases interpreting FRCP 12 as well as those interpreting RCFC 12.

by reference, and matters of which a court may take judicial notice.'" Bell/Heery v. United States, 106 Fed. Cl. 300, 307 (2012) (second alteration in original) (quoting Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007)). Based on this information, the court must make "all reasonable inferences in favor of the non-movant." Sommers Oil, 241 F.3d at 1378. Nonetheless, "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Iqbal, 556 U.S. at 678. Further, the court is "not bound to accept as true a legal conclusion couched as a factual allegation." Papasan v. Allain, 478 U.S. 265, 286 (1986); see Twombly, 550 U.S. at 555.

C. Interpretation of Contract Terms

Contracts to which the government is a party are subject to general rules of contract interpretation. Lockheed Martin IR Imaging Sys., Inc. v. West, 108 F.3d 319, 322 (Fed. Cir. 1997). Pursuant to these rules, "[c]ontract interpretation begins with the language of the written agreement." Coast Fed. Bank, FSB v. United States, 323 F.3d 1035, 1038 (Fed. Cir. 2003) (citing Foley Co. v. United States, 11 F.3d 1032, 1034 (Fed. Cir. 1993)). Contract provisions that are "clear and unambiguous . . . must be given their plain and ordinary meaning." McAbee Constr., Inc. v. United States (McAbee), 97 F.3d 1431, 1435 (Fed. Cir. 1996) (internal quotation marks omitted); accord Barsebäck Kraft AB v. United States, 121 F.3d 1475, 1479 (Fed. Cir. 1997). "A contract is unambiguous when it is reasonably open to only one interpretation." Pacificorp Capital, Inc. v. United States (Pacificorp), 25 Cl. Ct. 707, 716 (1992), aff'd, 988 F.2d 130 (Fed. Cir. 1993) (unpublished table decision).

Only when a contract contains vague and ambiguous language may the court look to factors outside the contractual terms--including explanatory recitals to the contract (also called "whereas clauses"), oral statements, writings, prior negotiations and other conduct by which the parties manifested assent--to determine the parties' intent. KMS Fusion, Inc. v. United States (KMS Fusion), 36 Fed. Cl. 68, 77 (1996), aff'd 108 F.3d 1393 (Fed. Cir. 1997) (unpublished table decision). Contract language is ambiguous if it is "susceptible to more than one reasonable interpretation." McAbee, 97 F.3d at 1434-35. "It is not enough that the parties differ in their interpretation of the contract clause." Dart Advantage Warehous., Inc. v. United States, 52 Fed. Cl. 694, 700 (2002) (citing Cmty. Heating & Plumbing Co. v. Kelso, 987 F.2d 1575, 1578 (Fed. Cir. 1993)). Instead, to be ambiguous, a contract must "sustain[] the interpretations advanced by both parties to the suit." Pacificorp, 25 Cl. Ct. at 716.

Of particular relevance to this case, the canons of interpretation of government contracts provide that a government representation does not constitute a binding contractual obligation unless it is "'stated in the form of an undertaking, not as a mere prediction or statement of opinion or intention.'" Chattler v. United States, 632 F.3d

1324, 1330 (Fed. Cir. 2011) (quoting Cutler-Hammer, Inc. v. United States, 194 Ct. Cl. 788, 794, 441 F.2d 1179, 1182 (1971)); Nat'l By-Prods., Inc. v. United States, 186 Ct. Cl. 546, 560, 405 F.2d 1256, 1264 (1969). Moreover, statutory provisions generally will not be "incorporated into a contract with the government unless the contract explicitly provides for their incorporation." St. Christopher Assocs., L.P. v. United States (St. Christopher), 511 F.3d 1376, 1384 (Fed. Cir. 2008); see Smithson v. United States, 847 F.2d 791, 794 (Fed. Cir. 1988) (finding that a contract "subject" to present and future regulations did not incorporate such regulations into the contract and stating that "only the plainest language" could impose such a contractual liability on the government (internal quotation marks omitted)).

D. Issue Preclusion

The doctrine of issue preclusion prevents a party from relitigating an issue when that party has litigated the same issue on the merits and lost. Masco Corp. v. United States, 303 F.3d 1316, 1329 (Fed. Cir. 2002); In re Freeman (Freeman), 30 F.3d 1459, 1465 (Fed. Cir. 1994). Issue preclusion requires that: (1) the issue be identical to the issue in the first action; (2) the issue was actually litigated in the first action; (3) resolution of the issue was essential to a final judgment in the first action; and (4) the party precluded had a full and fair opportunity to litigate the issue in the first action. Freeman, 30 F.3d at 1465; accord Masco Corp., 303 F.3d at 1329.

E. Declaratory Judgment

As a court of limited jurisdiction, the Court of Federal Claims cannot issue declaratory judgments without express statutory authorization. See United States v. Testan, 424 U.S. 392, 398 (1976) (characterizing the holding in United States v. King, 395 U.S. 1 (1969), as a holding that "the Declaratory Judgment Act did not grant the [United States] Court of Claims [(Court of Claims[9])] authority to issue declaratory judgments"); King, 395 U.S. at 5 (holding that the Court of Claims has no general authority to issue declaratory judgments); Suess v. United States, 33 Fed. Cl. 89, 92 (1995) ("[A]bsent statutory authorization, this court cannot grant equitable relief."). The court has statutory authorization to provide broad declaratory relief in certain categories of cases, including in the context of bid protests, for example. See 28 U.S.C. § 1491(b)(2); see also Halim v. United States, No. 12-5 C, 2012 WL 4356211, at *7 (Fed. Cl. Sept. 24, 2012) (describing statutory authorizations of the Court of Federal Claims to provide equitable relief in certain types of tax cases, disputes under the Contracts

[9] The United States Court of Claims (Court of Claims) is the predecessor court to this court and a predecessor to the United States Court of Appeals for the Federal Circuit. When acting in its appellate capacity, the Court of Claims created precedent that is binding on this court. South Corp. v. United States, 690 F.2d 1368, 1369 (Fed. Cir. 1982) (en banc).

Disputes Act of 1978 and pursuant to its bid protest jurisdiction). The court is also statutorily authorized to "issue orders [to any appropriate United States official] directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records," when such relief is "an incident of and collateral to" a money judgment. 28 U.S.C. § 1491(a)(2); see James v. Caldera, 159 F.3d 573, 580 (Fed. Cir. 1998) (interpreting "incident of and collateral to" to mean that non-monetary relief must be "tied and subordinate to a money judgment") (internal quotations omitted). However, the court lacks general authority to grant declaratory judgment in breach of contract cases that are outside these statutorily defined categories. See King, 395 U.S. at 5.

These limits on the court's authority to provide declaratory relief do not bar the court from making a ruling of law when such a ruling is "necessary to the resolution of a claim for money presently due and owing." Hydrothermal Energy Corp. v. United States (Hydrothermal), 26 Cl. Ct. 7, 16 (1992); see Pauley Petroleum, Inc. v. United States, 219 Ct. Cl. 24, 38, 591 F.2d 1308, 1315 (1979) (en banc) ("[M]erely because the court must make a ruling of law . . . in order to arrive at a money judgment does not render [the] court's decision a 'declaratory judgment' . . . .").

III. Discussion

Generally, the court considers whether jurisdictional requirements are met before turning to the merits of a plaintiff's claims. PODS, Inc. v. Porta Stor, Inc., 484 F.3d 1359, 1365 (Fed. Cir. 2007); see Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998) (stating the subject matter jurisdiction is a threshold matter). Here, because plaintiff's arguments are so protean, it is difficult to discern whether plaintiff is discussing the nature of a claim or how the claim accrued. In particular, jurisdictional analysis with respect to the statute of limitations is hindered by plaintiff's variable assertions. For example, plaintiff asserts--on the same page of its Response--both that defendant has "continuously breached" its purported drainage obligation "since at least 1986 by providing no drainage facilities or service at all" and that "no cause of action accrued until the Government made clear its intent to abandon its drainage obligation in September of 2010." Pl.'s Resp. 28 (internal quotation marks omitted); cf. id. at 40 ("Since the duty of immediate performance never arose, there was no breach."). Because of the difficulty in applying jurisdictional standards to irreconcilable assertions and because the substance of plaintiff's claims is intertwined with plaintiff's accrual theories, the court first considers whether--if plaintiff's Complaint were timely and otherwise within the court's jurisdiction--any of plaintiff's assertions would constitute a claim upon which relief can be granted.

A. Plaintiff Has Failed to State a Claim upon Which Relief Can Be Granted with Respect to Claims One Through Six

1. Claims One and Two: Breach of Contract

"To recover against the government for an alleged breach of contract, there must be, in the first place, a binding agreement." Anderson v. United States, 344 F.3d 1343, 1353 (Fed. Cir. 2003). Four requirements must be met for an agreement to bind the government: "(1) mutuality of intent to contract; (2) lack of ambiguity in offer and acceptance; (3) consideration; and (4) a government representative having actual authority to bind the United States in contract." Id. These requirements are the same whether the contract is express or implied. Trauma Serv. Grp. v. United States, 104 F.3d 1321, 1325 (Fed. Cir. 1997). Generally, statutory provisions will not be "incorporated into a contract with the government unless the contract explicitly provides for their incorporation." St. Christopher, 511 F.3d at 1384.

A contract is breached when a party fails to "perform a contractual duty when it is due." Winstar Corp. v. United States, 64 F.3d 1531, 1545 (Fed. Cir. 1995) (citing Restatement (Second) of Contracts § 235(2) (1981)), aff'd, 518 U.S. 839 (1996). "Non-performance includes defective performance as well as an absence of performance." Restatement (Second) of Contracts § 235 cmt. b.

Therefore, to survive defendant's Motion with respect to its breach of contract claims, plaintiff must have pleaded facts sufficient to allow the court to draw a reasonable inference, see Iqbal, 556 U.S. at 678, that defendant had an express or implied contractual duty to provide drainage and that defendant did not adequately perform such contractual duty when it was due, see Winstar Corp., 64 F.3d at 1545; Restatement (Second) of Contracts § 235(2) & cmt. b.

a. Past Breaches of Express Contractual Obligation

Defendant argues that "Westlands has failed to state a claim upon which relief can be granted because its complaint lacks sufficient factual allegations to establish, beyond a speculative level, the existence of a drainage obligation arising out of any of the contracts at issue." Def.'s Mot. at 14. Plaintiff responds that "beginning with the 1963 Contract, all contracts between Westlands and the Government expressly obligated the government to provide drainage." Pl.'s Resp. 9 (capitalization and emphasis omitted); see Compl. ¶ 5 ("Westlands included in all its contracts with the Government contractual obligations to build drainage facilities that incorporated the Government's statutory obligation."). However, plaintiff concedes that "[t]he Contracts . . . set no definite time for the government to provide drainage services, to construct a drainage system or even to construct discrete increments of a drainage system. Nor did they even set forth a construction schedule." Pl.'s Resp. 10. The court considers each of the contracts below.

i. 1963 Contract

a) Issue Preclusion

Plaintiff contends that "defendant is issue precluded from litigating whether the 1963 Contract obligates the government to provide drainage." Pl.'s Resp. 5 (capitalization and emphasis omitted). Plaintiff asserts that in prior litigation involving Westlands, "the court squarely held that the 1963 Contract required the Government to provide drainage." Id. Defendant responds that "[t]he sufficiency of Westlands'[] pleadings in this case has, of course, not been previously litigated or decided," Def.'s Reply 12, and that the issue in the previous litigation was not identical to the issue here, making issue preclusion inapplicable, id. at 12-13. Defendant also asserts that plaintiff's argument "overstates the holding of the decision in question." Id. at 12.

Under the doctrine of issue preclusion, a party that has litigated an issue on the merits and lost is precluded from relitigating that issue if four requirements are met: (1) the issue in the first action was identical to the issue before the court; (2) in the first action, the issue was actually litigated; (3) in the first action, the final judgment depended on the resolution of the issue; and (4) in the first action, the plaintiff had a full and fair opportunity to litigate the issue. Freeman, 30 F.3d at 1465; accord Masco Corp., 303 F.3d at 1329. Here, plaintiff's issue preclusion argument fails, both because the issue in the previous litigation was not identical to the issue here and because plaintiff misstates the court's ruling in the previous litigation.

The earlier case, United States v. Westlands Water District (Westlands I), was brought by the United States against Westlands after Westlands refused to pay full price--as required by federal reclamation law enacted in 1987--for federal water delivered to so-called excess lands. Westlands I, 134 F. Supp. 2d 1111, 1114-15 (E.D. Cal. 2001). The excess lands were lands exceeding a certain acreage within the Westlands water district, see Def.'s App. A34 (1963 Contract) (defining "excess land"), and the owners of the excess lands could receive water from Westlands only after executing contracts, referred to as "recordable contracts," in which the owners agreed to sell their excess land within ten years under certain terms, id. at A35; see Omnibus Adjustment Act of 1926, Pub. L. No. 69-284, § 46, 44 Stat. 636, 649 (codified as amended at 43 U.S.C. § 423e (2006)) (mandating sale of excess lands). Pursuant to the recordable contracts, the owners paid Westlands for water at a rate of eight dollars per acre-foot, a rate equal to the rate set forth in the 1963 Contract. See Westlands I, 134 F. Supp. 2d at 1115, 1138-39. Westlands collected these water charges and remitted payment to the United States for water service, pursuant to the 1963 Contract. See id. at 1115. The recordable contracts also contained a provision for the tolling of the ten-year period for selling excess lands (the tolling period) if "'water or service from the [Central Valley] Project [was] not . . . available to the land involved through no fault of [Westlands] or the Landowner.'" Id. at 1117 (quoting the recordable contracts).

The Westlands I court held that the landowners within Westlands water district were entitled to summary judgment that they had an enforceable right under the 1963 Contract, their recordable contracts and the Barcellos Judgment[10] to pay not the full price of water delivery as required by federal reclamation law but the eight dollar per acre-foot rate "for excess lands during any lawful [tolling period] caused by the government's failure, if any, to provide drainage." Westlands I, 134 F. Supp. 2d at 1158. The Westlands I court stated that the issue in the case before it was "the effect of an absence of drainage service on the full-cost provision and the [tolling] period." Id. at 1134. In evaluating that issue, the court stated that the term "service" in the portion of the recordable contracts related to the tolling period encompassed drainage service. Id.; see also id. at 1139-40 (discussing relevant provisions of the recordable contracts, which provided for tolling for any period in which "water or service" was not available). The court did not discuss or recognize any contractual drainage service obligation of the government to Westlands arising out of the 1963 Contract. See id. at 1138-39, 1142-43 (discussing provisions of the 1963 Contract). Instead, the Westlands I court stated that "[t]he 1963 Contract and the 1986 Barcellos Judgment [gave] a protectable contractual right to $8.00/acre-foot water for the water users' excess lands during any [tolling] periods caused by the government's failure, if any, to provide drainage service." Id. at

[10] In 1979, after the government challenged the validity of rates set by the 1963 Contract as a result of changes to federal reclamation laws, a group of landowners within the Westlands water district filed a class action suit to determine water priorities, with respect to both amount and price of water, against other landowners in the district, Westlands and the government. Barcellos & Wolfsen, Inc. v. Westlands Water Dist. (Barcellos), 491 F. Supp. 263, 264-65 (E.D. Cal. 1980); see Compl. ¶ 71. Westlands, named as a defendant in the suit, filed cross claims and counterclaims, "seeking a determination of the respective rights and duties of the parties under the [1963 Contract] and Federal Reclamation Law." Barcellos, 491 F. Supp. at 265. Westlands also filed another suit seeking similar relief, Westlands Water Dist. v. United States, No. CV F-81-245-EDP (E.D. Cal.), which was consolidated into Barcellos. Compl. ¶ 71; see Pl.'s App. 168 (Barcellos Judgment) (showing consolidation of No. CV F-81-245-EDP).

The consolidated cases ultimately settled, and judgment was entered pursuant to the parties' agreement. Compl. ¶ 73; see Pl.'s App. 167-222 (Barcellos Judgment). Notably, the Barcellos Judgment upheld the validity of the 1963 Contract. Compl. ¶ 73; see Pl.'s App. 177-80 (Barcellos Judgment). With respect to drainage, it required the government to "adopt and submit to [Westlands] by December 1, 1991, a Drainage Plan for Drainage Service Facilities," Pl.'s App. 186 (Barcellos Judgment); Compl. ¶ 74, and stated that the government would "make a good faith effort to construct water distribution and collector drainage facilities needed in the [Westlands Water] District in addition to those constructed under the 1965 [Repayment] Contract," Pl.'s App. 206 (Barcellos Judgment). However, the Barcellos Judgment was clear that "[n]othing in this Judgment . . . shall be deemed to create any obligation of the United States to provide any drainage service to [Westlands] or to construct Drainage Service Facilities." Id. at 222; see also id. at 173-74 (defining "Drainage Service Facility" broadly, to include the originally planned interceptor drain as well as any partial or full alternative to it).

1143. Because the issue in Westlands I--whether the eight-dollar per acre-foot rate or full cost provision applied for excess land owners during a tolling period, see id. at 1134,--is not identical to the issue raised in this case--whether the 1963 Contract obligated the government to provide drainage to Westlands, see Pl.'s Resp. 5 (characterizing "the issue presented here" as "whether the 1963 Contract obligated the Government to provide drainage"),--issue preclusion is inapplicable, see Masco Corp., 303 F.3d at 1329; Freeman, 30 F.3d at 1465.

Issue preclusion is also inappropriate because plaintiff's issue preclusion argument is based on a mischaracterization of Westlands I. Plaintiff states that the Westlands I court saw the issue of "whether the [ten-year] period was tolled during periods when no drainage service was being provided" as dependent upon "whether the 1963 Contract obligated the Government to provide drainage." Pl.'s Resp. 6. As discussed above, this is simply not true: the Westlands I court addressed the price of water for excess land owners, not a purported obligation under the 1963 Contract to provide drainage. See Westlands I, 134 F. Supp. 2d at 1134. Nonetheless, plaintiff contends that "the Court's conclusion that 'the parties agreed in the 1963 Contract to ten years of subsidized water and drainage service' precludes the government from arguing now that the 1963 Contract does not require the Government to provide drainage." Pl.'s Resp. 6 (emphasis omitted) (quoting Westlands I, 134 F. Supp. 2d at 1143 n.72). Plaintiff takes the Westlands I court's language completely out of context. The text of the footnote cited by plaintiff in support of its argument reads, in relevant part:

> [T]he parties agreed in the 1963 Contract to ten years of subsidized water and drainage service for excess lands under recordable contract. However, if drainage service has not been provided, . . . then those ten years of "water and service" for the excess lands have not yet been provided . . . . In that case, [the portion of the recordable contracts related to the tolling period] extends the ownership and contract-priced water for the excess lands until 10 years of water and drainage service have been provided.

Westlands I, 134 F. Supp. 2d 1143 n.72 (first emphasis added). In other words, the footnote acknowledges that the portions of the 1963 Contract addressing excess lands created a scheme under which the excess lands would receive subsidized water and drainage service--meaning water and drainage service at the eight dollar per acre-foot rate--during the ten-year period for selling the excess lands. See id. However, if the ten-year period was tolled until drainage service was provided, pursuant to the recordable contracts, then the eight dollar rate--as opposed to the full cost of water delivery--would continue to apply. Id. This footnote, contrary to plaintiff's assertion, see Pl.'s Resp. 6, does not acknowledge any governmental obligation to provide drainage to Westlands arising out of the 1963 Contract; nor do the footnote and surrounding text cited by

plaintiff amount to a holding that Westlands has a contractual right to drainage under the 1963 Contract. Issue preclusion is therefore inappropriate.

b) Contract Terms

Plaintiff also contends that the 1963 Contract expressly obligated defendant "to sell water to Westlands and provide the drainage services and facilities necessary to drain the land to which that water was applied." Compl. ¶ 30. Plaintiff further contends that it agreed to build local drainage facilities to carry water to the interceptor drain "[i]n reliance o[n] the Government's commitment to build the Interceptor Drain." Pl.'s Resp. 11 (citing Def.'s App. A25 (1963 Contract) (authorizing connection of local drainage facilities to the interceptor drain)). Defendant replies that plaintiff has "fail[ed] to identify any provision of the 1963 Contract that obligated the government to provide drainage," Def.'s Mot. 15, and that the contract provisions cited by plaintiff in support of its argument refer only "to the parties' recognition that Interior intended to provide an interceptor drain as set forth in the San Luis Act," id. at 19-20.

The court now examines the provisions of the 1963 Contract cited by plaintiff as purported sources of a contractual drainage obligation. For the following reasons, the court concludes that none of these provisions creates such an obligation.

First, plaintiff cites the rate provision. See Pl.'s Resp. 11. The contract's rate provision includes a fifty-cent per acre-foot drainage service component. See Def.'s App. A15 (1963 Contract). Westlands argues that its position that this creates a contractual drainage obligation is strengthened by the contract provision that the drainage service component become payable when--not if--interceptor drain service became available. Pl.'s Resp. 11; cf. Def.'s App. A15 (1963 Contract). Defendant points out that the rate provision specifies only the "statutorily-required rate, as well as when and how Westlands would make payment" but "does not contain any language[]by which the United States allegedly undertook a drainage obligation." Def.'s Mot. 19. Defendant is correct; there is no language in the rate provision creating an express drainage obligation.

Federal reclamation law makes clear that, at the time the 1963 Contract was entered into, water service contract rates reflected the Secretary's estimate of annual operation and maintenance costs, as well as other fixed costs. See 1939 Act § 9(e), 53 Stat. at 1196. That a drainage service component was included in the 1963 Contract rate reflects only the estimated annual costs of operating and maintaining the planned drainage facilities. Cf. Chattler, 632 F.3d at 1330 (stating that a government representation must be stated in the form of an undertaking, not as a prediction or opinion, to be binding); Nat'l By-Prods., Inc., 186 Ct. Cl. at 560, 405 F.2d at 1264 (same). Based on its plain meaning, the rate provision is not a binding governmental obligation to undertake to complete the interceptor drain but is, instead, a binding

payment term. See McAbee, 97 F.3d at 1435 (stating that the plain language of an unambiguous contract provision controls). Similarly, the contract provision stating that the drainage component rate was not payable until interceptor drain service was available did not constitute a binding government undertaking to provide drainage; it was instead a statement of the government's prediction or intent that drainage service would be available in the future--and a binding obligation with respect to payment terms if and when the contemplated drainage service became available. Cf. Chattler, 632 F.3d at 1330; Nat'l By-Prods., Inc., 186 Ct. Cl. at 560, 405 F.2d at 1264.

Next, plaintiff asserts that "[f]urther confirmation of the Government's [drainage] obligation can be found in" the contract provision in which defendant "reserves the privilege to 'temporarily discontinue or reduce . . . the service of the interceptor drain.'" Pl.'s Resp. 12 (alteration in original). Plaintiff contends that "[w]ere the Government not obligated to provide drainage service," this provision would be unnecessary. Id. Defendant argues that, to the extent that any drainage obligation can be inferred from this provision, such an obligation must be statutory because the provision itself contains no language setting forth a binding government undertaking to provide drainage. Def.'s Reply 10 (citing Chattler, 632 F.3d at 1330).

Defendant is again correct; there is no language in this provision creating an express drainage obligation. The provision serves mainly as a notice provision with respect to the interceptor drain, providing that "so far as feasible the United States will give [Westlands] due notice in advance of such temporary discontinuance or reduction." See Def.'s App. A21 (1963 Contract). Such a provision is entirely consistent with defendant's statutory duty to provide drainage, cf. San Luis Act § 5, 74 Stat. at 159 (discussing Secretary's authority to construct, operate and maintain a drainage system for the San Luis unit); Firebaugh Canal Co. v. United States (Firebaugh), 203 F.3d 568, 578 (9th Cir. 2000) (holding that the government had a statutory duty under the San Luis Act to provide drainage to Westlands), and does not constitute a separate contractual undertaking to provide drainage. At most it represents defendant's prediction or intent that the interceptor drain will provide service to Westlands in the future. Cf. Chattler, 632 F.3d at 1330; Nat'l By-Prods., Inc., 186 Ct. Cl. at 560, 405 F.2d at 1264.

Plaintiff also cites to several nonoperative portions of the 1963 Contract, including two explanatory recitals and a definitional term, in support of its position. See Pl.'s Resp. 11. The third and fifth explanatory recitals state, respectively, in relevant part:

> WHEREAS, the United States is providing an interceptor drain to meet the drainage requirements of the San Luis Unit of the Federal Central Valley Project; and
>
> . . . .

> WHEREAS, [Westlands] desires to contract . . . for the furnishing by the United States of a supplemental water supply from the Project and for drainage service by means of the interceptor drain for which [Westlands] will make payment to the United States upon the basis, at the rate, and pursuant to the conditions hereinafter set forth[.]

Def.'s App. A5 (1963 Contract); see Pl.'s Resp. 11. The 1963 Contract defines "interceptor drain" as "the physical works constructed by the United States pursuant generally to the [San Luis Act] . . . in order to meet the drainage requirements of the area served by the San Luis Unit." Def.'s App. A6-7 (1963 Contract); see Pl.'s Resp. 11. Defendant contends that "[t]hese recitals and definition did not obligate the Government to provide drainage service," both because whereas clauses and definitions are not "operative portion[s] of the contract" and because "the language cited by Westlands does not amount to binding promises by the United States to provide drainage." Def.'s Mot. 16. Defendant further contends that, "to the extent the contract contemplated drainage, it stated drainage is a statutory obligation; it says nothing about a contractual duty." Id. at 17. Defendant is correct.

Courts do not interpret a government representation as a binding contractual obligation unless it is "stated in the form of an undertaking, not as a mere prediction or statement of opinion or intention." Chattler, 632 F.3d at 1330 (internal quotation marks omitted); Nat'l By-Prods., Inc., 186 Ct. Cl. at 560, 405 F.2d at 1264. Only where a contract contains vague and ambiguous language may the court look to factors outside the contractual terms, including to the explanatory recitals (or "whereas clauses"), to determine the parties' intent. KMS Fusion, 36 Fed. Cl. at 77. "'[W]hereas' clauses generally are not considered 'contractual' and cannot be permitted to control the express provisions of the contract . . . ."[11] Id.

Here, there is no basis for concluding from the explanatory recitals and definition that defendant was contractually obligated to provide drainage to plaintiff under the 1963 Contract. Plaintiff cites no operative contract provision that is susceptible to the interpretation that it created a drainage obligation because none of the provisions cited by plaintiff contains language creating a drainage obligation. Cf. McAbee, 97 F.3d at 1434-35 (stating that a contract is ambiguous if it is susceptible to more than one

[11] Plaintiff cites Solar Turbines, Inc. v. United States (Solar Turbines), 23 Cl. Ct. 142, 149 n.2 (1991) as an example of a case where the court construed an explanatory recital or "whereas clause" as implying a promise by the government. Pl.'s Resp. 8. However, the finding of the court in Solar Turbines was that the promise contained in the whereas clause at issue in that case (stating that the government was willing to provide additional funding to the plaintiff)--and its fulfillment--constituted consideration for the contract. See Solar Turbines, 23 Cl. Ct. at 149 n.2. The Solar Turbines court did not find that the whereas clause in that case was itself an enforceable contract provision.

interpretation). And even if the court were to look beyond the operative contract provisions to the explanatory recitals and definition for the parties' intent, cf. KMS Fusion, Inc., 36 Fed. Cl. at 77 (stating that a court may look outside the contractual terms, including to explanatory recitals, to determine the parties' intent only when the language of the contract is vague and ambiguous), it cannot conclude that the recitals and definition manifest an intent to create a contractual drainage obligation. At most, the third explanatory recital, see Def.'s App. A5 (1963 Contract), and the definition of "interceptor drain," see id. at A6-7, constitute a statement that defendant intended to fulfill its statutory duty to provide drainage pursuant to the San Luis Act, cf. St. Christopher, 511 F.3d at 1384 (stating that the United States Court of Appeals for the Federal Circuit (Federal Circuit) "has been reluctant to find that statutory . . . provisions are incorporated into a contract with the government unless the contract explicitly provides for their incorporation"). Similarly, the fifth explanatory recital, see Def.'s App. A5 (1963 Contract), establishes at most plaintiff's intent to contract for water supply and drainage service at the rates set out in the 1963 Contract. The recitals and definition do not create a binding contractual drainage obligation. Cf. Chattler, 632 F.3d at 1330; Nat'l By-Prods., Inc., 186 Ct. Cl. at 560, 405 F.2d at 1264.

For the foregoing reasons, with respect to the 1963 Contract, plaintiff has not pleaded sufficient facts to state a facially plausible claim for relief based on an express breach of contract theory. See Iqbal, 556 U.S. at 678; Twombly 550 U.S. at 570.

ii. 1965 Repayment Contract

Plaintiff alleges that "[t]he 1965 contract expressly, and independently, created an obligation of the government to provide drainage." Pl.'s Resp. 12 (capitalization and emphasis omitted). Defendant responds that plaintiff failed to allege a breach with respect to the 1965 Repayment Contract "because it acknowledges that segments of the project were constructed and that it has been repaying the construction costs incurred." Def.'s Reply 16. In other words, defendant argues that its contractual obligations, if any, to provide drainage pursuant to the 1965 Repayment Contract have been met. See id.

The 1965 Repayment Contract covered the costs of the actual construction of the San Luis unit, as required by federal reclamation law. See supra Part I.B.2. The substance of the bargain underlying the 1965 Repayment Contract is contained in two promises. First, defendant promised that, "[t]o the extent that funds [were then] or [t]hereafter [would] be available[,] . . . the United States [would] expend toward construction of a distribution system . . . a sum not in excess of" $157,048,000. Def.'s App. A131 (1965 Repayment Contract) (emphasis added). Notably, this provision conditioned construction of the contemplated distribution system for the San Luis unit, which included drainage, on the availability of funds. See id. (defining "distribution

system"). In return, plaintiff promised to "repay to the United States the actual cost of the distribution system constructed" up to $157,048,000. Id. at A134-35.

Under the terms of the 1965 Repayment Contract, the first phase of construction was to include "substantially all of the water distribution facilities, drainage collector facilities, and works for the integration of ground with surface water, . . . as initially required to serve [a certain portion of Westlands water district]." Id. at A132. Plaintiff began making payments pursuant to the 1965 Repayment Contract in or about 1979, Compl. ¶ 40; see id. ¶ 53, when the first phase of the subsurface drainage system connecting Westlands to the interceptor drain was completed, see id. ¶ 52. As defendant correctly notes, see Def.'s Reply 16, plaintiff does not allege that the completion of this portion of the construction, which resulted in drainage service to Westlands from 1979 to 1985, see Compl. ¶¶ 52, 58; Def.'s Mot. 7, failed to include "substantially all" of the facilities "initially required" to serve the portion of Westlands water district covered by the contract provision, see Pl.'s Resp. 13-14 (discussing its claim for breach of the 1965 Repayment Contract); cf. Def.'s App. A132 (1965 Repayment Contract).

Instead, plaintiff's argument that defendant has breached a duty to provide drainage pursuant to the 1965 Repayment Contract appears to be based on the fact that the interceptor drain and construction contemplated by the 1965 Repayment Contract were not completed.[12] See Pl.'s Resp. 13-14 (pointing to, apparently in support of its position that defendant was committed to providing drainage as contemplated by the 1965 Repayment Contract, maps showing the contemplated interceptor drain and other contemplated construction and the schedule for the proposed construction phases). Following completion of the first phase of construction, the government determined--incorrectly, according to plaintiff--that funds were insufficient for the completion of the remaining two phases of contemplated construction. See Compl. ¶¶ 54-55. However, the availability of funds was a condition precedent for performance of the contemplated construction. See Def.'s App. A131 (1965 Repayment Contract). Moreover, plaintiff's own acknowledgment that "[t]he Contracts . . . set no definite time for the government to provide drainage services, to construct a drainage system or even to construct discrete increments of a drainage system," Pl.'s Resp. 10, belies plaintiff's assertion that the 1965 Repayment Contract obligated defendant to complete the contemplated construction. Instead, the 1965 Repayment Contract obligated plaintiff to repay the government for

[12] Defendant contends that, to the extent that plaintiff argues that a contractual obligation arose out of the 1965 Repayment Contract with respect to the interceptor drain, such an argument must fail because the 1965 Repayment Contract pertains only to local drainage systems. Def.'s Reply 17 (citing 43 U.S.C. § 485h(d)-(e) (2006)). The court does not address whether the distribution system covered by the 1965 Repayment Contract included the interceptor drain because, as discussed in Part III.A.1a.ii above, the court finds that plaintiff has not pleaded facts sufficient to allege any unmet contractual obligation to provide drainage. Therefore, the court need not reach the issue.

actual costs of building facilities that defendant had a statutory obligation to provide. See San Luis Act § 1(a), 74 Stat. at 156; see also St. Christopher, 511 F.3d at 1384 (stating that the Federal Circuit "has been reluctant to find that statutory . . . provisions are incorporated into a contract with the government unless the contract explicitly provides for their incorporation").

Plaintiff's arguments to the contrary are not persuasive. For example, plaintiff cites to the third and sixth explanatory recitals for the proposition that providing "a drainage collector system" was "[a]n expressed purpose of this agreement." Pl.'s Resp. 12. Those recitals state:

> WHEREAS, [Westlands], in order to utilize . . . the water supply made available under the [1963 Contract] and such future contracts as may be made between the United States and [Westlands], desires that a water distribution and drainage collector system be constructed for [Westlands water district] by the United States . . . pursuant to federal reclamation laws; and
> . . . .
>
> WHEREAS, the United States is willing to undertake the construction of the aforementioned water distribution and drainage collector system under the conditions hereinafter set forth[.]

Def.'s App. A130 (1965 Repayment Contract). As discussed above with respect to the 1963 Contract, recitals are generally not considered contractual, and government representations are not binding contractual obligations unless stated as an undertaking rather than an intention. See supra Part III.A.1.a.i. Here, the third recital merely states plaintiff's desire that drainage be constructed, and the sixth recital expresses a government intention to undertake construction of drainage but does not itself contain a present undertaking. Cf. Chattler, 632 F.3d at 1330 (stating that, to be binding, a government representation must be "stated in the form of an undertaking, not as a mere prediction or statement of opinion or intention" (internal quotation marks omitted)); Nat'l By-Prods., Inc., 186 Ct. Cl. at 560, 405 F.2d at 1264 (same). However, even if the sixth recital could be interpreted as an undertaking to construct drainage, such an undertaking is limited by the terms of the 1965 Repayment Contract, which do not obligate defendant beyond the performance already rendered under the agreement because construction was conditioned on the availability of funds. See Def.'s App. A131 (1965 Repayment Contract); cf. McAbee, 97 F.3d at 1435 (stating that unambiguous contract terms "must be given their plain and ordinary meaning").

Plaintiff also cites to the best efforts clause, by which the parties agreed to "'exert their best efforts to expedite the completion' of the 'distribution system.'" Pl.'s Resp. 14

(quoting Def.'s App. at A132 (1965 Repayment Contract)). However, plaintiff merely quotes this provision without explaining how it supports plaintiff's position. See id.; see also Def.'s Reply 16 ("Westlands has not alleged the Government failed to comply with the . . . best efforts clause[] or identified any related damages"). Moreover, defendant argues that, in any event, such a claim would be time-barred. Def.'s Mot. 24; Def.'s Reply 16. Defendant is correct. The first phase of construction was completed in 1979, Compl. ¶ 52, so, to the extent that plaintiff is attempting to allege any breach of the best efforts clause with respect to the first phase of construction, such a claim would be time-barred, see 28 U.S.C. § 2501 (providing for six-year statute of limitation in the Court of Federal Claims). With respect to phases two and three of construction contemplated by the 1965 Repayment Contract, commencement of construction--conditioned on the availability of funds--was scheduled for 1974 and 1979, respectively. See Def.'s App. A131, A133 (1965 Repayment Contract). Therefore, any claim alleging a breach of the best efforts clause as a result of defendant's determination that funds were not available to begin construction of phases two and three at the anticipated times would also be time-barred. See 28 U.S.C. § 2501. Finally, the maps relied on by plaintiff, "show[ing] drainage facilities, including the Interceptor Drain," and the "drainage collector system" do not constitute a "commitment" by the government to provide drainage, cf. Pl.'s Resp. 13-14, but reflect, at most, the intent of the government to complete the construction in accordance with the maps, cf. Chattler, 632 F.3d at 1330; Nat'l By-Prods.,Inc., 186 Ct. Cl. at 560, 405 F.2d at 1264.

Plaintiff's citations to the 1965 Repayment Contract--without explanation or analysis--and conclusory statement that "a clearer commitment to provide drainage is hard to imagine," see Pl.'s Resp. 13-14, do not suffice to state a claim upon which relief can be granted, cf. Iqbal, 556 U.S. at 678. Plaintiff has not alleged facts sufficient to state a facially plausible claim for relief based on an express breach of the 1965 Repayment Contract. See id.; Twombly 550 U.S. at 570.

iii. 2007 Interim Contract

Plaintiff argues that "the 2007 Interim Renewal Contract carried forward the drainage obligations created by the 1963 and 1965 Contracts," Pl.'s Resp. 14 (capitalization and emphasis omitted), and did not "abrogate[e] the obligation to provide drainage created by the 1963 and 1965 Contracts," id. at 16. However, neither the 1963 Contract nor the 1965 Repayment Contract created a drainage obligation, see supra Parts III.A.1.a.i-ii, and any references that they make to defendant's statutory drainage obligation did not transform it into a contractual one, cf. St. Christopher, 511 F.3d at 1384. Nor do the specific provisions of the 2007 Interim Contract cited by plaintiff give rise to such an obligation.

First, plaintiff cites a number of recitals to the 2007 Interim Contract and states that in those recitals, defendant "acknowledge[d] its obligation to provide drainage under Firebaugh,"[13] represented its intention, "to the extent appropriated funds are available, to develop and implement" drainage solutions for the San Luis unit, and noted actions it has

[13] After the completed portion of the interceptor drain was closed in 1986, Westlands and other landowners inside and outside the San Luis unit sued the government in Sumner Peck Ranch, Inc. v. Bureau of Reclamation (Sumner Peck), 823 F. Supp. 715 (E.D. Cal. 1993), and Firebaugh Canal Co. v. United States (Firebaugh), 203 F.3d 568 (9th Cir. 2000), seeking completion of the interceptor drain. See Firebaugh, 203 F.3d at 572 (citing, inter alia, Sumner Peck, 823 F. Supp. 715); Compl. ¶ 81. These lawsuits were partially consolidated in Firebaugh in 1992 "to resolve the plaintiffs' mutual allegation that the Secretary of the Interior is required by law to construct facilities to drain agricultural drainage water from certain lands in Westlands Water District." Firebaugh, 203 F.3d at 572; see Compl. ¶ 81.

With respect to the consolidated portion of the cases, the district court in Firebaugh concluded "that the San Luis Act established a mandatory duty to provide drainage that had not been excused" by impossibility. Firebaugh, 203 F.3d at 572. In 1995, the district court entered partial final judgment on that issue and ordered the government to "'without delay, take such reasonable and necessary actions to promptly prepare, file, and pursue an application for a discharge permit for the [interceptor drain] to comply with . . . the San Luis Act to provide drainage to the San Luis Unit.'" Mem. Decision Granting Fed. Defs.' Mot. for Entry of J. (Firebaugh J. Order) at 2, Firebaugh, Nos. 1:88-cv-00634 LJO DLB & 1:91-cv-00048 LJO DLB (partially consolidated), Dkt. No. 943 (E.D. Cal. Mar. 13, 2012) (quoting Order of Mar. 12, 1995, Dkt. No. 442, at 11-12).

On appeal, the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) affirmed the government's "duty to provide drainage service under the San Luis Act" but reversed the portion of the district court judgment "that foreclose[d] non-interceptor drain solutions," stating that "subsequent Congressional action has given discretion to the Department [of Interior] in creating and implementing a drainage solution." Firebaugh, 203 F.3d at 578. The Ninth Circuit further declared that "the time has come for the Department of Interior and the Bureau of Reclamation to bring the past two decades of studies, and the 50 million dollars expended pursuing an 'in valley' drainage solution, to bear in meeting its duty to provide drainage under the San Luis Act." Id. On remand in 2000, the government was "ordered to submit 'a detailed plan describing the action . . . they will take to promptly provide drainage to the San Luis Unit.'" Firebaugh J. Order 2 (quoting Order of Dec. 18, 2000, Dkt. No. 654, at 4). Final judgment was ordered in the Firebaugh case on March 19, 2012--after the remaining claims in the case were resolved--but the final judgment did not disturb the partial final judgment concerning the government's statutory duty to provide drainage to the San Luis unit. Final J. on Claims in Pls.' Fifth Am. Compl. at 1, Firebaugh, Nos. 1:88-cv-00634 LJO DLB & 1:91-cv-00048 LJO DLB (partially consolidated), Dkt. No. 945 (E.D. Cal. Mar. 19, 2012). The district court retains jurisdiction to enforce the partial final judgment. Id. at 1-2; see also Firebaugh J. Order 2 (stating that, following the partial judgment, the district court reserved jurisdiction to enforce compliance).

taken toward providing a drainage solution. Pl.'s Resp. 15 (internal quotation marks omitted) (citing Def.'s App. A49-50 (2007 Interim Contract)). Defendant responds that "the recitals identified by Westlands refer and relate to the Government's obligation to provide drainage and the efforts taken in that regard; they are not relevant to any potential contractual obligation." Def.'s Reply 14. Defendant is correct.

Recitals are generally not considered contractual, and government representations are not binding contractual obligations unless stated as an undertaking rather than an intention. See supra Part III.A.1.a.i. The recitals cited by plaintiff contain only statements of intention or representations of actions already taken, not contractual statements of a present undertaking. Cf. Chattler, 632 F.3d at 1330; Nat'l By-Prods., Inc., 186 Ct. Cl. at 560, 405 F.2d at 1264. Further, the reference in a recital to Firebaugh, 203 F.3d 568, relates to defendant's statutory duty to provide drainage, see id. at 578 (affirming the trial court's holding that the government had a statutory duty under the San Luis Act to provide drainage to Westlands, but reversing the trial court's holding that the government's drainage obligation was required to be satisfied by the construction of an interceptor drain)--and does not purport to incorporate this statutory duty into the contract, cf. St. Christopher, 511 F.3d at 1384. Plaintiff has not alleged facts sufficient to support a drainage obligation arising out of the explanatory recitals to the 2007 Interim Contract.

Plaintiff also cites, see Pl.'s Resp. 15, a drainage service rate provision of the 2007 Interim Contract (the drainage service rate provision), which provides, "The Contracting Officer shall notify the contractor in writing when drainage service becomes available . . . [and thereafter] shall provide drainage service to [Westlands] at rates established pursuant to then-existing ratesetting policy for Irrigation Water," Def.'s App. A82 (2007 Interim Contract); see id. at A112 (2007 Interim Contract Ex. B (2007 rates and charges)) (showing a 2007 rate of twenty-four cents for operation and maintenance of the interceptor drain). However, any drainage obligation contained in this drainage service rate provision is expressly conditioned on drainage service becoming available, see id. at A82 (2007 Interim Contract), and this condition has not been met. Nonetheless, plaintiff appears to suggest that the drainage service rate provision, along with the 2007 rates and charges included as Exhibit B to the 2007 Interim Contract, create an affirmative contractual obligation of the government to make drainage service available--but plaintiff neither expressly makes that argument nor explains how these provisions would give rise to such an obligation. See Pl.'s Resp. 15-16. Defendant responds that "[the drainage service rate] provision is merely a notification provision and does not give rise to a duty to provide drainage" and that drainage-related rate information in the contract--like the rate information set forth in the 1963 Contract--provides only "the rate information . . . required by statute but contains no language by which the United States undertakes any drainage obligation." Def.'s Reply 14.

Defendant is correct: such a provision is entirely consistent with defendant's statutory duty to provide drainage and does not constitute a contractual undertaking to provide drainage service. At most it represents defendant's prediction or intent that drainage service will be provided to Westlands in the future. Cf. Chattler, 632 F.3d at 1330; Nat'l By-Prods.,Inc., 186 Ct. Cl. at 560, 405 F.2d at 1264. Moreover, there is no language in either the drainage service rate provision, see Def.'s App. A82 (2007 Interim Contract), or the 2007 rates and charges in Exhibit B to the 2007 Interim Contract, see id. at A112 (2007 Interim Contract Ex. B (2007 rates and charges)), that creates an express obligation to provide drainage service. Pursuant to federal reclamation law, a water service contract must include "such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper." 43 U.S.C. § 485h(e). As with the 1963 Contract, see supra Part III.A.1.a.i, the inclusion of drainage-related rate information reflects only estimated annual operating and maintenance costs and other fixed charges with respect to future drainage service anticipated by defendant; it is not an affirmative present undertaking by the government to provide drainage service, cf. Chattler, 632 F.3d at 1330; Nat'l By-Prods., Inc., 186 Ct. Cl. at 560, 405 F.2d at 1264.

Therefore, with respect to the 2007 Interim Contract, plaintiff has not pleaded facts that would "raise a right of relief above the speculative level." Cf. Twombly, 550 U.S. at 555.

iv. 2010 Interim Contract

The 2010 Interim Contract incorporated the terms of the 2007 Interim Contract. See Def.'s App. A122 (2010 Interim Contract); Compl. ¶ 46; Def.'s Mot. 6. Plaintiff does not allege that this contract created a separate contractual right to drainage service but, instead, asserts that it did not "abrogate the obligation to provide drainage created by the 1963 and 1965 Contracts." Pl.'s Resp. 16. However, because neither the 1963 Contract nor the 1965 Repayment Contract created a general drainage obligation, see supra Parts III.A.1.a.i-ii, plaintiff's argument fails. Accordingly, plaintiff has not pleaded facts that would "raise a right of relief above the speculative level" with respect to the 2010 Interim Contract. Cf. Twombly, 550 U.S. at 555.

Although the court is required to "accept as true all the factual allegations in the complaint" and to "make all reasonable inferences in favor of the non-movant" when ruling on a 12(b)(6) motion, Sommers Oil, 241 F.3d at 1378, the court is "not bound to accept as true a legal conclusion couched as a factual allegation," Papasan, 478 U.S. at 286; see Twombly, 550 U.S. at 555. Here, plaintiff has pointed to a number of contractual provisions that, it contends, constitute an express obligation to provide drainage to Westlands. See supra Part III.A.1.a. However, plaintiff's legal conclusion is

simply not supported by the plain language of the contracts. See supra Part III.A.1.a; cf. McAbee, 97 F.3d at 1435. Indeed, as plaintiff points out, "[t]he Contracts . . . set no definite time for the Government to provide drainage services, to construct a drainage system or even to construct discrete increments of a drainage system. Nor did they even set forth a construction schedule." Pl.'s Resp. 10. Accordingly, the court holds that no provision of the 1963 Contract, the 1965 Repayment Contract, the 2007 Interim Contract nor the 2010 Interim Contract creates an express contractual obligation of defendant to provide drainage to Westlands.[14]

b. Past Breaches of Implied Contractual Obligation

Defendant contends that plaintiff "has not alleged any facts that would show the existence of an implied contractual obligation," both because an implied contract cannot exist when an express contract between the parties governs the same subject and because plaintiff has not alleged any facts sufficient to show the existence of a separate implied contract. Def.'s Mot. 24-25. With respect to the first issue raised by defendant, plaintiff responds that, if the court concludes that there is no express contract with regard to drainage, an implied contract can be found, Pl.'s Mot. 17, and that, "[m]oreover, the implied contract Westlands alleges can be upheld as a modification of the express contract," id. at 18. With respect to the second issue raised by defendant, plaintiff states that its "Complaint alleges a multitude of specific facts that would support a finding of a contract implied in fact, or an amendment of the express contracts by subsequent words and conduct." Id. at 19. Plaintiff states that these alleged facts include: the fact that drainage is necessary for irrigation, the inclusion of a drainage component in plaintiff's water service contract rates since 1967, plaintiff's consistent payment of drainage-related charges, the court's "holding" in Westlands I, the various explanatory recitals cited by plaintiff in which defendant expresses an intent to provide drainage and plaintiff's reliance on defendant's expressed intent to provide drainage. Id.

An implied-in-fact contract requires a "meeting of the minds," which "is inferred, as a fact, from conduct of the parties showing . . . their tacit understanding." Trauma Serv. Grp., 104 F.3d at 1326 (internal quotation marks omitted); cf. Anderson, 344 F.3d at 1353 (requiring mutuality of intent to contract). "In short, an implied-in-fact contract arises when an express offer and acceptance are missing but the parties' conduct indicates

[14] Westlands argues that, "[a]t the most[,] from the perspective of the Government's Motion, the Contracts are ambiguous as to the existence of [a drainage] obligation, and the Motion must be denied for that reason alone." Pl.'s Resp. 16 n.6. However, the court finds that the plain language of the contracts does not give rise to a contractual drainage obligation and, therefore, that the contracts are not ambiguous with respect to that issue. See Dart Advantage Warehous., Inc. v. United States, 52 Fed. Cl. 694, 700 (2002) ("It is not enough that the parties differ in their interpretation of the contract clause.") (citing Cmty. Heating & Plumbing Co. v. Kelso, 987 F.2d 1575, 1578 (Fed. Cir. 1993)).

mutual assent." City of Cincinnati v. United States, 153 F.3d 1375, 1377 (Fed. Cir. 1998). As with an express contract, an implied-in-fact contract with the United States requires a government agent with actual authority to contract. Id. at 1377; Trauma Serv. Grp., 104 F.3d at 1326. The "risk of having accurately ascertained that he who purports to act for the government does in fact act within the bounds of his authority" is assumed by the private contracting party. Schism v. United States, 316 F.3d 1259, 1278 (Fed. Cir. 2002) (citing Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947)). An implied-in-law contract, on the other hand, imputes a promise to perform a legal duty by fiction of law when no intent to contract is shown. Algonac Mfg. Co. v. United States, 192 Ct. Cl. 649, 674, 428 F.2d 1241, 1255 (1970) (citing Balt. & Ohio R.R. v. United States, 261 U.S. 592, 597 (1923) and 17 C.J.S. Contracts § 4 (1963)). The Court of Federal Claims has jurisdiction over claims involving implied-in-fact contracts but lacks jurisdiction over claims based on contracts implied in law. Id. at 1256.

Regarding the issue of whether an implied contract and express contract can coexist, "[i]t is well settled that the existence of an express contract precludes the existence of an implied-in-fact contract dealing with the same subject matter, unless the implied contract is entirely unrelated to the express contract." Schism, 316 F.3d at 1278; see Trauma Serv. Grp., 104 F.3d at 1326. Here, the facts cited by plaintiff in support of its implied contract argument do not support such an argument because they are too closely related to the subject matter of the express contracts. Cf. Schism, 316 F.3d at 1278; Trauma Serv. Grp., 104 F.3d at 1326. Indeed, the facts cited by plaintiff in support of its implied contract claim consist primarily of portions of the four express contracts and examples of plaintiff's performance under those contracts, specifically: inclusion of a drainage component in plaintiff's water service contract rates since 1967, plaintiff's consistent payment of drainage-related charges pursuant to each of the contracts, defendant's intent to provide drainage expressed in explanatory recitals to the contracts, and plaintiff's purchase of water from defendant pursuant to the water service contracts. Pl.'s Resp. 19. These facts do not support plaintiff's implied contract argument because an implied contract based on portions of the express contracts or plaintiff's performance under them would be related to the express contracts and deal with the same subject matter. Cf. Schism, 316 F.3d at 1278 (stating that "an express contract precludes the existence of an implied-in-fact contract dealing with the same subject matter"). Plaintiff also cites the court's holding in Westlands I in support of its implied contract claim. Pl.'s Resp. 19. However, plaintiff's assertion that the Westlands I court "held that both water and drainage service were the predominant benefit of the bargain to Westlands under the Contracts," id. (internal quotation marks omitted), is an assertion of a fact that, if true, would be related to the express contracts because it is an interpretation of the express contracts--and, therefore, could not support an implied contract claim that was "entirely unrelated to the express contract[s]," cf. Schism, 316 F.3d at 1278.

Finally, plaintiff asserts in support of its implied contract claim the additional fact that drainage is necessary for irrigation. Pl.'s Resp. 19. However, this fact does not implicate any conduct by the parties from which mutual assent can be inferred and, therefore, does not support plaintiff's implied contract claim. Cf. City of Cincinnati, 153 F.3d at 1377 (stating that an implied contract arises when "the parties' conduct indicates mutual assent").

Plaintiff's breach of implied contract claim fails because any implied contract that could arise from the facts pleaded by plaintiff would be precluded owing to the close relationship between the facts pleaded by plaintiff and the subject matter of the express contracts. Cf. Schism, 316 F.3d at 1278; see Trauma Serv. Grp., 104 F.3d at 1326. Plaintiff has not pleaded other, unrelated facts sufficient to allow the court to draw a reasonable inference that the parties mutually assented to a contractual drainage obligation. Cf. Iqbal, 556 U.S. at 678; Anderson, 344 F.3d at 1353.

Similarly, plaintiff also fails to show that the implied contract it alleges was a modification of the express contracts because most of the facts cited by plaintiff as evidence of an implied contract are either provisions of the express contracts or examples of plaintiff's performance in compliance with them. Cf. Pl.'s Resp. 19 (listing "specific facts" that plaintiff claims "would support a finding of a contract implied in fact, or an amendment of the express contracts by subsequent words and conduct"). In other words, the facts alleged by plaintiff do not show any modification or amendment to the contracts because they consist of the contract terms themselves, provide an alleged interpretation of the contract terms or are consistent with performance of the contract terms--none of which tends to show amendment or modification of the contract terms.

2. Claims Three to Five: Related Breach of Contract Claims

a. Breach of Implied Obligation of Good Faith and Fair Dealing

Government contracts, like all other contracts, include an implied duty of good faith and fair dealing, which requires that each party not interfere with the other party's rights under the contract. Precision Pine & Timber, Inc. v. United States (Precision Pine), 596 F.3d 817, 828 (Fed. Cir. 2010); Centex Corp. v. United States (Centex), 395 F.3d 1283, 1304 (Fed. Cir. 2005). Because this implied duty protects contractual rights, exactly what it "entails depends in part on what [a given] contract promises." Precision Pine, 596 F.3d at 830; see Scott Timber Co. v. United States, 692 F.3d 1365, 1372 (Fed. Cir. 2012) ("[T]he existence of the covenant of good faith and fair dealing depends on the existence of an underlying contractual relationship . . . ." (brackets and internal quotation marks omitted)). Significantly, a party's contractual obligations are not expanded by the implied duty of good faith and fair dealing. Precision Pine, 596 F.3d at 831; see Bradley v. Chiron Corp., 136 F.3d 1317, 1326 (Fed. Cir. 1998) (citing Racine & Laramie, Ltd. v.

Cal. Dep't of Parks & Recreation, 14 Cal. Rptr. 2d 335, 339 (Cal. Ct. App. 1992) for the proposition that "implied covenants of good faith and fair dealing are limited to assuring compliance with the express terms of the contract and [cannot] be extended to create obligations not contemplated in the contract").

To support a claim for breach of the implied obligation of good faith and fair dealing with respect to a government contract, a plaintiff must show that the government acted in a way "specifically designed to reappropriate the benefits the other party expected to obtain from [the contract], thereby abrogating the government's obligations under the contract." Precision Pine, 596 F.3d at 829; Centex, 395 F.3d at 1311. In other words, "liability only attaches if the government action 'specifically targeted' a benefit" of the government contract at issue, Precision Pine, 596 F.3d at 830, "so as to destroy the reasonable expectations of the other party regarding the fruits of the contract," Centex, 395 F.3d at 1304. A showing of bad faith is not an element of the claim. See Precision Pine, 596 F.3d at 830. When a contractual benefit is expressly qualified, there is no breach of the duty of good faith and fair dealing when interference with contractual performance is in the manner contemplated and provided for. Id. at 830-31.

Here, plaintiff's claim focuses principally on allegations of bad faith, as evidenced by plaintiff's contention that "the government's bad faith is palpable and specifically and exhaustively pled." Pl.'s Resp. 20 (capitalization and emphasis omitted). In support of this contention, plaintiff points to the closing of the Kesterson Reservoir and completed portion of the interceptor drain and the fact that the government has not provided drainage since Westlands' local drainage collector system was plugged in 1986. Id. Plaintiff also points to prior litigation, including Barcellos and Firebaugh, citing the government's failure to provide drainage pursuant to court orders in those cases as further evidence of bad faith. Id. at 21-22. Finally, plaintiff alleges that a 2010 letter from the Commissioner of the Bureau of Reclamation to United States Senator Diane Feinstein (the Feinstein Letter) "abandoned Westlands to its own devices, stating that if the local water districts did not come up with a drainage solution themselves, the [Bureau of Reclamation] would cut off their water." Id. at 22. Plaintiff summarizes its argument:

> And so here we are, 12 years after the [Firebaugh court] ordered the Government to provide actual drainage "promptly," and 26 years after the drain was plugged, without a spade in the ground, without one yard of earth moved, without one drainage-related facility built and with not a drop of water being drained from Westlands' lands.

Id. Defendant responds that "Westlands has failed to show a contractual obligation to provide drainage to which the duty of good faith and fair dealing could attach," a failure that, defendant contends, is "fatal to [plaintiff's] claim of breach of the implied duty of good faith and fair dealing." Def.'s Mot. 26.

Defendant is correct. As discussed in detail above, plaintiff has failed to show a contractual duty to provide drainage arising out of any of the 1963 Contract, the 1965 Repayment Contract, the 2007 Interim Contract, the 2010 Interim Contract or any implied contract. See Part III.A.1. Therefore, there is no contractual drainage duty to which the implied duty of good faith and fair dealing can attach. Cf. Precision Pine, 596 F.3d at 830 (stating that the implied duty of good faith and fair dealing depends on what is promised in a given contract). Further, plaintiff has not shown that defendant acted to deprive plaintiff of the fruits of the contracts or to abrogate governmental obligations under the contracts. Because plaintiff failed to show that drainage service was a bargained-for benefit of any of these contracts, plaintiff has not shown that drainage service is a "fruit" of any of the contracts. Cf. Centex, 395 F.3d at 1304 (stating that a breach of the implied obligation of good faith and fair dealing occurs when a party "destroy[s] the reasonable expectations of the other party regarding the fruits of the contract"). Nor could any contractual drainage obligation of the government be abrogated when no such obligation existed. Cf. Precision Pine, 596 F.3d at 829 (stating that a claim for breach of the implied duty of good faith and fair dealing requires a showing of an abrogation of the government's obligations under the contract); Centex, 395 F.3d at 1311.

Moreover, the contracts specifically contemplated that funds may not be available for completing the planned drainage system construction. The construction contemplated by the 1965 Repayment Contract was expressly conditioned on the availability of funds, see supra Part III.A.1.a.ii, and the 1963 Contract included a provision that stated that, with respect to any performance of the United States that required appropriations by Congress or other allotment of funds, the unavailability of such funds would "not relieve [Westlands] from any obligations then accrued under this contract, and no liability [would] accrue to the United States in case such funds are not appropriated or allotted," Def.'s App. A39 (1963 Contract). By the plain language of the contract, plaintiff accepted the risk that it would have to keep making payments under the 1963 Contract, including the drainage component, even if drainage was not constructed. Cf. Precision Pine, 596 F.3d at 830-31 (stating that there was no violation of the implied duty of good faith and fair dealing when interference with performance was contemplated and provided for in the contract).

For these reasons, plaintiff's attempt to use the implied duty of good faith and fair dealing to expand the government's contractual obligations fails. Cf. Precision Pine, 596 F.3d at 831 (stating that the implied duty of good faith and fair dealing cannot be used to expand contractual obligations); Bradley, 136 F.3d at 1326. Plaintiff, therefore, has not pleaded sufficient facts to state a plausible claim for relief on the theory that the government breached an implied obligation of good faith and fair dealing. Cf. Iqbal, 556 U.S. at 678.

b. Total Breach of Contractual Drainage Obligations[15]

A total breach of contract occurs when the breach "'so substantially impairs the value of the contract to the injured party at the time of the breach that it is just in the circumstances to allow him to recover damages based on all his remaining rights to performance.'" Hansen Bancorp, Inc. v. United States (Hansen), 367 F.3d 1297, 1309 (Fed. Cir. 2004) (quoting Restatement (Second) of Contracts § 243(4)). To establish a total breach, a plaintiff must show that the breach was "material, substantial, essential, or vital"--that it "went to the root of the defendant's [contractual] obligation." First Annapolis Bancorp, Inc. v. United States (First Annapolis), 89 Fed. Cl. 765, 800 (2009) (internal quotation marks omitted); Restatement (Third) of Restitution and Unjust Enrichment § 37 cmt. c (2011). When a party to a contract is in total breach, the non-breaching party may elect "to declare the contract terminated and sue for total breach or to continue the contract and sue for partial breach." Pac. Gas & Electric Co. v. United States (PG&E), 70 Fed. Cl. 766, 771 (2006); see Cities Serv. Helex, Inc. v. United States, 211 Ct. Cl. 222, 234-35, 543 F.2d 1306, 1313 (1976). However, a party waives it right to restitution for total breach when it accepts or receives partial performance. See Mobil Oil Exploration & Producing Se., Inc. v. United States (Mobil Oil), 530 U.S. 604, 622 (2000) ("[A]cceptance of performance under a once-repudiated contract can constitute a waiver of the right to restitution that repudiation would otherwise create."); PG&E, 70 Fed. Cl. at 772.

Here, plaintiff contends that it "contracted for the provision of drainage in 1963 and 1965," but, "since 1986, the Government has provided only studies, evaluations, and planning" while "Westlands has been continuously paying for drainage." Pl.'s Resp. 24. Plaintiff concludes, "This is as total a breach as there can be." Id. Defendant does not address plaintiff's total breach claim specifically but contends that "Westlands failed to state a claim upon which relief can be granted because it failed to identify any contract provision that created a drainage obligation arising out of any of the contracts at issue. . . . Thus, Westlands'[] breach of contract claims fail." Def.'s Reply 1-2; cf. Pl.'s Resp. 23 ("[T]he Government appears to limit its theory here to the claim that there is no contractual obligation to be totally breached.").

[15] Plaintiff reasons that its fourth claim for relief (total breach) is distinct from its first three breach of contract claims (past breaches of an express or implied contractual drainage obligation, see supra Part III.A.1, and past breach of the implied obligation of good faith and fair dealing, see supra Part III.A.2.a) because, although those claims "seek damages for the Government's failure to provide drainage in the past," "this claim looks to the future[] and claims damages for the remaining performance due under the contract," Pl.'s Resp. 23. It is unclear, therefore, whether plaintiff asserts partial breach claims in its first three claims (as distinguished from its total breach claim asserted in claim four), or whether plaintiff is asserting different claims based on different theories of damages. Plaintiff's theory of partial breach is discussed further in Part III.B.1.a.i.

Defendant is correct: plaintiff's claim of total breach fails because plaintiff has not alleged a breach of defendant's remaining contractual obligations. Cf. First Annapolis, 89 Fed. Cl. at 800; Restatement (Third) of Restitution and Unjust Enrichment § 37 cmt. c. As discussed above, see supra Part III.A.1, plaintiff did not contract for the provision of drainage in any of the contracts at issue. Accordingly, plaintiff has no remaining right to the government's performance of a contractual drainage obligation under any of these contracts because no such right or obligation ever existed. Cf. Hansen, 367 F.3d at 1309 (stating that a claim for material breach allows a party to recover damages for its remaining rights to performance under the contract); Restatement (Second) of Contracts § 243(4).

Plaintiff's claim for total breach also fails because plaintiff has accepted performance by defendant under all of the contracts. Cf. Mobil Oil, 530 U.S. at 622 (stating that acceptance of part performance after repudiation constitutes waiver of restitution damages); PG&E, 70 Fed. Cl. at 772. In particular, the payments plaintiff made pursuant to the 1965 Repayment Contract were for the actual costs of constructing phase one of the contemplated drainage system, see 1939 Act § 9(d), 53 Stat. at 1195 (codified as amended at 43 U.S.C. § 485h(d)) (governing repayment contracts), which served Westlands from 1979 through 1985, Compl. ¶ 58; Def.'s Mot. 7. In other words, plaintiff's payments under the 1965 Repayment Contract were payments for performance already rendered. With respect to the water service contracts, plaintiff received water from defendant, pursuant to the 1963 Contract, beginning in 1967. Compl. ¶ 20; Def.'s Mot. 5. After the expiration of the 1963 Contract, plaintiff received water from defendant pursuant to further contracts for water service, including the 2007 and 2010 Interim Contracts, see supra Parts I.B.3-4, and plaintiff receives water from defendant presently, Def.'s Mot. 8; see Pl.'s App. 9-39 (2012 interim renewal contracts) (providing for water service into 2014). These facts indicate that plaintiff has accepted and continues to accept at least part performance under the water service contracts. Plaintiff argues that the government's obligation to provide water "is separate and divisible from its obligation to provide drainage," Compl. ¶ 156, but no such contractual drainage obligation exists, see supra Part III.A.1. Moreover, the 1963 Contract states that it is "indivisible for purposes of validation."[16] Def.'s App. A42 (1963 Contract).

For these reasons, the facts asserted by plaintiff do not state a plausible claim for relief based on a total breach theory. Cf. Iqbal, 556 U.S. at 678.

[16] The court understands the phrase "indivisible for purposes of validation" to indicate that the parties intended the contract to be entire and not severable. Cf. 17A C.J.S. Contracts § 443 (2012) (stating that "[t]he intention of the parties is a primary consideration in the determination of whether a contract is entire or severable" and "is to be ascertained from the terms or language of the contract," among other factors).

c. Anticipatory Breach of Contractual Drainage Obligations

Anticipatory breach, also known as repudiation, occurs when a contractually obligated party communicates that it will commit a breach that would constitute a total breach. See Mobil Oil, 530 U.S. at 608 (citing Restatement (Second) of Contracts §§ 243, 250, 373); Dow Chem. Co. v. United States, 226 F.3d 1334, 1344 (Fed. Cir. 2000). The repudiating party's refusal to perform its contractual obligation must be made "distinctly and unqualifiedly to the other party." Dow Chem. Co., 226 F.3d at 1334. An act may constitute a repudiation if it is "voluntary and affirmative" and "make[s] it actually or apparently impossible for [the obligated party] to perform." Restatement (Second) of Contracts § 250 cmt. c.

Plaintiff contends that the Feinstein Letter "is as clear a repudiation of the drainage obligation as there can be." Pl.'s Resp. 25. However, as discussed above, see supra Part III.A.1, no such contractual drainage obligation existed to be repudiated. Further, plaintiff has not shown that the letter is a distinct, unqualified refusal to perform a contractual duty, made by defendant to plaintiff. Cf. Dow Chem. Co., 226 F.3d at 1334. In particular, the letter cannot be characterized as the government's making a repudiation to Westlands because the letter was not addressed to Westlands. Compl. Ex. A (Feinstein Letter) 1. In addition, the letter did not even mention a contractual drainage obligation. Instead, it acknowledged the government's statutory drainage obligation and discussed the steps being taken to comply with that obligation. See id. at 1-2 (acknowledging the holding in Firebaugh that the "San Luis Act imposes on the Secretary a duty to provide drainage service to the [San Luis] Unit," discussing Interior's inability to implement a 2007 record of decision (the 2007 record of decision), and stating that sufficient appropriations "remained to allow Interior to construct one subunit of drainage facilities within Westlands Water District"). The letter also sought legislative assistance to comply with defendant's statutory drainage obligation, stating that, beyond one subunit of drainage facilities, Interior "will be unable to proceed without additional Congressional authorization." Id. at 2. Finally, the letter requested a legislative response and described "key elements of a long-term legislative drainage strategy" that the Administration would support. Id. at 2-4. These key elements included transferring irrigation drainage responsibility to local control, id. at 2, which plaintiff appears to have misinterpreted as a declaration "that from now on, the drainage obligation falls to the water districts on pain of losing their water," see Pl.'s Resp. 25. Nowhere does the letter say that defendant refuses to perform a contractual drainage obligation.

Plaintiff also contends that "the Government's forty years of failing to provide drainage and temporizing over the last twenty-six years is conduct from which a repudiation can be inferred." Id. at 26 (citing Restatement (Second) of Contracts § 250). However, for an act to constitute repudiation, it "must be both voluntary and affirmative, and must make it actually or apparently impossible for [the obligated party] to perform."

Restatement (Second) of Contracts § 250 cmt. c. The government's failure to provide drainage is not an affirmative act, nor has plaintiff alleged that it makes it actually or apparently impossible for the government to provide drainage in the future. Cf. id. And plaintiff has not shown any contractual obligation to provide drainage in the first place. See Part III.A.1.

Plaintiff has failed to allege facts sufficient to state a plausible claim for relief based on an anticipatory breach theory. Cf. Iqbal, 556 U.S. at 678.

3. Claim Six: Declaratory Relief Regarding Amounts to Be Paid Under the 1965 Repayment Contract and Any Future Repayment Contracts

Plaintiff requests that, if the court finds neither a total breach nor an anticipatory breach of a contractual drainage obligation by defendant, Compl. ¶ 165, that the court grant declaratory judgment for Westlands "that any obligations [plaintiff] has under Section 9(d) of the [1939 Act], 43 U.S.C. § 485h(d), the 1965 Repayment Contract and/or any future repayment contracts must be based on inflation adjusted dollars going back to when the work should have been done," id. ¶ 176. Defendant, without explaining its rationale, moves to dismiss this claim pursuant to RCFC 12(b)(6). See Def.'s Mot. 1.

The 1965 Repayment Contract, governed by 43 U.S.C. § 485h(d), where section 9(d) of the 1939 Act has been codified, provides for repayment of actual construction costs of the San Luis Unit. See supra Part I.B.2. In or about 1979, when the subsurface drainage system was connected to the completed portion of the interceptor drain and began providing drainage service to Westlands, see Compl. ¶ 52, plaintiff began making payments pursuant to the 1965 Repayment Contract for the actual costs of that completed phase of construction, id. ¶¶ 40, 53. Thus, all repayments made by plaintiff pursuant to the 1965 Repayment Contract were for construction completed by 1979. Plaintiff now appears to contend that the first phase of construction--and the entire contemplated drainage system--should have been completed in or around 1967, see id. ¶ 169, when the distribution system began delivering water to Westlands, id. ¶ 20. Plaintiff argues that it "should not be held responsible for" the "exponential[]" "escalation in construction costs . . . due to the Government's breach of its obligation to build the required drainage system in a timely manner." Id. ¶¶ 170-72.

The plain language of the statute and the 1965 Repayment Contract make clear that plaintiff is obligated to repay the actual costs of construction, with no provision for adjustment for inflation. Nothing in the language of the statute indicates that a party to a repayment contract has a right to adjust the actual costs of construction for inflation. Instead, the statute provides that "the part of the construction costs allocated by the Secretary to irrigation shall be included in a general repayment obligation." 43 U.S.C. § 485h(d)(2). Similarly, the 1965 Repayment Contract provides that "[Westlands] shall

repay to the United States the actual cost of the distribution system constructed and acquired pursuant to [the terms of the 1965 Repayment Contract]." Def.'s App. A134 (1965 Repayment Contract) (emphasis added).

Because plaintiff has not shown that either the 1965 Repayment Contract or the applicable federal reclamation laws would allow it to pay less than the actual costs of construction, plaintiff has failed to plead facts that raise a right to declaratory relief above a speculative level. Cf. Twombly, 550 U.S. at 555.

B. This Court Lacks Jurisdiction over Plaintiff's Claims, in Part

For the reasons stated in Part III.A, plaintiff has not pleaded facts sufficient to state a claim on which relief can be granted with respect to claims one through six. Defendant also moves under 12(b)(1) to dismiss plaintiff's claims one through four and six for lack of subject matter jurisdiction. If a court determines that it does not have subject matter jurisdiction over a claim, it must dismiss the claim. See RCFC 12(h)(3). The plaintiff bears the burden of showing jurisdiction by a preponderance of the evidence. Taylor, 303 F.3d 1357, 1359 (Fed. Cir. 2002).

1. Statute of Limitations

The Court of Federal Claims has an absolute, jurisdictional six-year statute of limitations, John R. Sand & Gravel Co., 552 U.S. at 133-34, which is measured from the date on which a claim first accrues, 28 U.S.C. § 2501. A claim first accrues "'when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action.'" Brighton Vill. Assocs., 52 F.3d at 1060 (quoting Kinsey, 852 F.2d at 557).

When a breach of contract claim is based on a failure to act, there are two prerequisites for accrual: (1) performance must be due, see id. (stating that a breach of contract claim arises when "a plaintiff had done all he must do to establish his entitlement to [performance] and the defendant does not [perform]"); see e.g., Brown Park, 127 F.3d at 1455 (stating that breach of contract claim based on government's failure to make proper rent adjustments accrued at specified times when the government failed to make the adjustments in violation of the contracts at issue), and (2) the plaintiff must have suffered damages because performance was not rendered, see Alder Terrace, Inc. v. United States, 161 F.3d 1372, 1377 (Fed. Cir. 1998) (finding that claim accrued when the plaintiff first suffered its alleged breach of contract damages); Terteling v. United States, 167 Ct. Cl. 331, 338, 334 F.2d 250, 254 (1964). When a breach is only partial, each subsequent partial breach constitutes a new and separate claim, each with its own statute of limitations. San Carlos Irrigation & Drainage Dist. v. United States (San Carlos), 23 Cl. Ct. 276, 280 (1991); see Restatement (Second) of Contracts § 236 cmt. a ("Every

breach gives rise to a claim for damages."). When a breach of contract claim is based on repudiation, the claim accrues either at the time of repudiation--if the non-breaching party chooses to treat the repudiation as a present breach--or at the time when performance is due--if the nonbreaching party chooses to await performance. Franconia Assocs. v. United States (Franconia), 536 U.S. 129, 144 (2002) (citing 1 C. Corman, Limitation of Actions § 7.2.1 (1991)).

Defendant argues that the statute of limitations bars plaintiff's claims one through four and six because "Westlands has alleged that the Government breached its contractual obligations . . . beginning in 1986" but "did not file suit until January 6, 2012." Def.'s Mot. 10. Plaintiff responds, "Because the Government's time for performance was indefinite and necessarily took time to complete, and because the Government continuously assured Westlands that performance would be forthcoming, no cause of action accrued until the Government made clear its intent to abandon its drainage obligation in September 2010 with the Feinstein Letter." Pl.'s Resp. 28. Defendant replies that the theory of accrual articulated by plaintiff in its Response "is based only upon the Government's alleged 'repudiation' of its purported contractual obligation to provide drainage," and, therefore, plaintiff "has abandoned any other theory on the time and manner by which it alleges breach occurred." Def.'s Reply 3.

Plaintiff's accrual argument appears to be based, at least in part, on the finding of the Westlands I court that payments pursuant to the 1963 Contract of the fifty-cent drainage rate component did not have to be applied to drainage costs in the same year in which they were collected. See Pl.'s Resp. 39 (citing Westlands I, 134 F. Supp. 2d at 1157 n.98). Plaintiff appears to reason that, because drainage component charges could potentially be applied to drainage service in a later year, there was "no date in the past when it can be said the Government's duty of immediate performance arose." See id. at 40. In other words, plaintiff contends that defendant's performance under the contract is not yet due. Under this line of reasoning, however, plaintiff's breach of contract claims can only be brought under a theory of repudiation. Cf. Franconia Assocs., 536 U.S. at 144 (stating that a claim based on repudiation occurs at the time of repudiation if the non-breaching party elects to treat the repudiation as a present breach); Brighton Vill. Assocs., 52 F.3d at 1060 (stating that a breach of contract claim arises when "a plaintiff has done all he must do to establish his entitlement to [performance] and the defendant does not [perform]"). Therefore, defendant is correct that certain language used by plaintiff in its Response, see, e.g., Pl.'s Resp. 28 (stating that "no cause of action accrued until the Government made clear its intent to abandon its drainage obligation in September 2010 with the Feinstein Letter"), appears to indicate that plaintiff has abandoned its breach of contract claims based on theories other than repudiation. However, plaintiff also repeats in its Response allegations of "continuous breach" of the purported drainage obligation since at least 1986--allegations that imply that defendant's performance of the purported contractual obligation was due by 1986. See Pl.'s Resp. 43 (internal quotation marks

omitted). Because plaintiff's allegations are conflicting, it is unclear whether plaintiff has abandoned its breach of contract claims based on theories other than repudiation. Accordingly, the court addresses each of plaintiff's claims, including those based on theories other than repudiation.

a. Claims One and Two: Past Breaches of Express and Implied Contracts

i. 1963 Contract, 1965 Repayment Contract and Any Implied Contract

A claim for breach of contract based on a failure to act first accrues when: (1) performance is due, see Brighton Vill. Assocs., 52 F.3d at 1060, and (2) the plaintiff suffers damages as a result of nonperformance, see Alder Terrace, Inc., 161 F.3d at 1377 (finding that claim accrued when the plaintiff first suffered its alleged breach of contract damages); Terteling, 167 Ct. Cl. at 338, 334 F.2d at 254. Plaintiff appears to contend that, because it had performed all conditions precedent by timely paying drainage components, Compl. ¶¶ 134, 140, continuing performance of the government's purported contractual drainage obligation was due in 1986, when drainage service was cut off, see id. ¶¶ 133 ("The United States has continuously breached [its contractual drainage] obligation by providing inadequate drainage facilities and services, and since at least 1986 by providing no drainage facilities or services at all"), 139 (same with respect to implied contract claim); see also Pl.'s Resp. 43. But see Pl.'s Resp. 40 ("[T]here was no breach of [the government's drainage] obligation sufficient to trigger the running of the Statute of Limitations . . . until it became clear [that] no drainage would be forthcoming."). Further, based on the facts pleaded, the damages or injuries alleged by plaintiff as a result of the government's purported breaches of a contractual drainage obligation generally were first suffered prior to 2006. These injuries include: paying for drainage facilities that were not built, paying for drainage services that were not delivered, paying for drainage facilities that have not functioned as required, paying for drainage services not of the quality and functionality required, paying more for delayed construction owing to inflation, paying for facilities, operations and services in anticipation of the contemplated drainage system that are now of diminished value, paying mitigation expenses and being forced to retire or fallow significant portions of land owing to the lack of drainage, and being deprived of the value of the contemplated drainage system. Compl. ¶ 130. The accrual date for each of these injuries is considered below.

Significantly, Westlands has been making the drainage component payments about which it complains since 1979. Id. ¶ 40. At that time, all drainage construction contemplated by the contracts had already been completed or suspended. Specifically, construction of the interceptor drain was suspended in 1975. See id. ¶ 51. Phases two and three of construction contemplated by the 1965 Repayment Contract were suspended in or about 1978. See id. ¶ 54. Therefore, plaintiff's alleged injuries with respect to

payment for facilities that were not built or that have not functioned as required arguably first accrued as early as 1979. Cf. Alder Terrace, Inc., 161 F.3d at 1377. Plaintiff has also been deprived of the value of the contemplated drainage system since at least 1978, when the second and third phases of construction were suspended. Compl. ¶ 54. Further, plaintiff's alleged injury of paying for drainage services not of the quality and functionality required would have first accrued by 1986, at the latest, because the drainage services Westlands received from 1979 through 1985 ended in 1986, see Compl. ¶¶ 58, 63-64, and no drainage has otherwise been provided since then, see id. ¶ 67; cf. Alder Terrace, Inc., 161 F.3d at 1377. Similarly, plaintiff's alleged injury of paying for drainage services that were not delivered appears to have first accrued in 1986, when plaintiff was first paying a drainage rate component but receiving no service. See Compl. ¶¶ 40, 67; cf. Alder Terrace, Inc., 161 F.3d at 1377. Additionally, the only actual costs of drainage construction plaintiff has paid were pursuant to the 1965 Repayment Contract for construction completed in 1979. See supra pp. 35 (explaining that "plaintiff's payments under the 1965 Repayment Contract were payments for performance already rendered"), 37 (explaining that "all repayments made by plaintiff pursuant to the 1965 Repayment Contract were for construction completed by 1979"). Any injury related to inflated construction costs repayable under that contract would have first accrued in 1979, when payments began. Cf. Alder Terrace, Inc., 161 F.3d at 1377. Lastly, plaintiff does not state when it first made other expenditures in anticipation of the contemplated drainage system, paid mitigation expenses and retired or fallowed significant portions of land owing to the lack of drainage. However, these are all alleged injuries stemming from a lack of drainage, and Westlands stopped receiving drainage in 1986. Therefore--based on the facts contained in plaintiff's pleadings--all the events that would fix the liability of the government with regard to any breach of the 1963 Contract, the 1965 Repayment Contract or any implied contract would have occurred before 2006, outside the limitations period. See 28 U.S.C. § 2501 (providing for six-year statute of limitations); cf. Brighton Vill. Assocs., 52 F.3d at 1060 (stating that a claim first accrues "'when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action'" (quoting Kinsey, 852 F.2d at 557)).

Plaintiff argues, however, that "even if the statute of limitations has run on some portion of Westlands' breach of contract claims . . . it has not run on damages suffered within six years of the filing of the complaint" pursuant to a partial breach theory or the continuing claims doctrine or both. Pl.'s Resp. 40 (capitalization and emphasis omitted); id. at 46. When a party sues for a partial breach, the party seeks damages for only part of its remaining rights to performance under the contract. Restatement (Second) of Contracts § 236(2); see, e.g., Yankee Atomic Electric Co. v. United States, 536 F.3d 1268, 1271-73 (Fed. Cir. 2008) (finding a partial breach when the government failed to remove radioactive waste over a twelve-year period after the contracting party had made the necessary contractual payments for removal and disposal). Each time a partial breach

of contract occurs, a new claim accrues with its own statute of limitations. San Carlos, 23 Cl. Ct. at 280.

In San Carlos, for example, a case relied upon by plaintiff in support of its partial breach theory, see Pl.'s Resp. 42, the government's failure to maintain a reservoir's spillway gates led to two minor overflows of the reservoir, San Carlos, 23 Cl. Ct. at 277-78. The San Carlos Irrigation and Drainage District sued the government for breach of a contractual duty to maintain the irrigation works, pursuant to a repayment contract. Id. at 278. The San Carlos court held that each minor overflow was a partial breach of the government's continuous duty to maintain the spillways and, although the first overflow was outside the statute of limitations, the second overflow was not time-barred because, as a partial breach, it constituted a newly accrued claim. Id. at 280-82.

Plaintiff argues that because the purported contractual drainage obligation owed by the government is "continuing," any partial breaches "occurring within the limitations period are not time-barred, even though breaches also occurred outside the period." Pl.'s Resp. 42. However, plaintiff fails to explain how any specific facts pleaded would support a finding of partial breach, instead relying on its allegations that the government's breach has been "continuous" and merely reciting the facts and findings in San Carlos, without explaining how that case supports its argument. See id. at 42-44. To the extent that any reports or schedules filed in connection with the Firebaugh litigation and any failures to act in accordance with any of these documents, the 2010 Feinstein Letter, unsuccessful repayment contract negotiations--or any other events alleged in the pleadings to have occurred after January 6, 2006--can be understood to be alleged as partial breaches, see Compl. ¶¶ 102-18, 122-27; Pl.'s Resp. 43-45, such claims would survive the statute of limitations, see 28 U.S.C. § 2501. Nevertheless, because plaintiff has failed to show any drainage obligation arising from the 1963 Contract, 1965 Repayment Contract or any implied contract that potentially could be breached by such actions, see supra Part III.A.1, these claims do not survive defendant's motion.

With respect to plaintiff's continuing claims argument, the continuing claims doctrine also allows new and independent breaches by the government to be treated as separate causes of action--each with its own statute of limitations.[17] See Boling, 220 F.3d

[17] The continuing claims doctrine has not been consistently recognized in this court. See Sankey v. United States, 22 Cl. Ct. 743, 746 (1991) ("This court no longer recognizes the continuing claims doctrine." (citing Hart v. United States, 910 F.2d 815, 817 (Fed. Cir. 1990))). Nonetheless, it is currently recognized and applied. See Nicholas v. United States, 42 Fed. Cl. 373, 377 (1998) (concluding that the rejection of the continuing claims doctrine in Hart had been abrogated by the decision of the United States Supreme Court (Supreme Court) in Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp of Cal., Inc., 522 U.S. 192 (1997)); see, e.g., Hatter v. United States, 203 F.3d 795, 799 (Fed. Cir. 2000) (describing requirements for

at 1373-74. Therefore, a continuing claim is similar to a partial breach in that it allows some claims to survive the statute of limitations; however, it is distinguishable in that it is narrower and generally applies to a series of continuing breaches of a systematic duty rather than to isolated partial breaches of a continuing contract. See San Carlos, 23 Cl. Ct. at 280 (distinguishing a continuing breach from partial breaches of a continuing contract).

For the continuing claims doctrine to apply, (1) the case must turn on pure issues of law (or specific issues of fact to be decided by the court for itself); (2) any facts involved must be "sharp and narrow"; and (3) no discretionary agency decision can be at issue. Hatter v. United States, 203 F.3d 795, 799 (Fed. Cir. 2000) (citing Friedman v. United States, 159 Ct. Cl. 1, 6-8, 310 F.2d 381, 384-85 (1962)), aff'd in part and rev'd in part on other grounds, 532 U.S. 557 (2001). Claims to which the continuing claims doctrine have been applied have been characterized as "inherently susceptible to being broken down into a series of independent and distinct events or wrongs, each having its own associated damages." Brown Park Estates-Fairfield Dev. Co. v. United States (Brown Park), 127 F.3d 1449, 1457-58 (Fed. Cir. 1997). For example, when a plaintiff has an absolute statutory or contractual right to periodic payments (independent of discretionary administrative action), a new claim accrues pursuant to the continuing claims doctrine with each failure to make a proper payment when it is due. See Hatter, 203 F.3d at 799-800; Brown Park, 127 F.3d at 1457-58; Friedman, 159 Ct. Cl. at 6-8, 310 F.2d at 384-85.

In contrast, "a claim based upon a single distinct event, which may have continued ill effects later on, is not a continuing claim." Brown Park, 127 F.3d at 1456; Harvest Inst. Freedman Fed'n v. United States, 80 Fed. Cl. 197, 200 (2008). Nor is the continuing claims doctrine applicable when all the events necessary to the claim occurred outside the statute of limitations, more than six years before the claim was brought. See, e.g., Dalles Irrigation Dist. v. United States, 88 Fed. Cl. 601, 612-13 (2009) (finding that an alleged breach by the Bureau of Reclamation of its duty to grant surplus credits for historical overcharges was not renewed each year because all events to fix liability would have occurred the first time such a credit was not granted); cf. Brighton Vill. Assocs., 52 F.3d at 1060 (stating that a claim first accrues "'when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action.'" (quoting Kinsey, 852 F.2d at 557)).

To the extent that plaintiff may be understood to argue that the Feinstein Letter (or other events alleged in the pleadings to have occurred after January 6, 2006) constituted new and independent breaches to which the continuing claims doctrine would be

---

continuing claims doctrine to apply) (citing Friedman v. United States, 159 Ct. Cl. 1, 6-8, 310 F.2d 381, 384-85 (1962)), aff'd in part and rev'd in part on other grounds, 532 U.S. 557 (2001).

applicable, see Pl.'s Resp. 43-45, such an argument fails. With respect to the first two requirements for the continuing claims doctrine, the court could infer an argument--based on plaintiff's statement that "the written agreements unambiguously establish a drainage obligation, but [Westlands] has not yet moved for summary judgment presenting that issue," Pl.'s Resp. 16 n.6--that the case turns only on pure issues of law or specific, "sharp and narrow" issues of fact to be decided by the court for itself, cf. Hatter, 203 F.3d at 799 (listing, inter alia, whether the case "turn[s] on pure issues of law or specific facts which the court is to decide for itself" and whether it requires the court to "resolve sharp and narrow factual issues" as factors to consider in determining whether the continuing claims doctrine applies); Friedman, 159 Ct. Cl. at 7, 310 F.2d at 384-85 (same). Nonetheless, the continuing claims doctrine is inapplicable because plaintiff concedes that this is a case involving agency discretion. See Compl. ¶ 88 (stating that, pursuant to Firebaugh, the government has discretion to determine how to provide drainage service to Westlands); cf. Hatter, 203 F.3d at 797-98 (stating that the continuing claims doctrine does not apply in cases involving agency discretion); Friedman, 159 Ct. Cl. at 6-8, 310 F.2d at 384-85 (same).

Further, unlike the periodic payment cases, this is not a case where a plaintiff has alleged a right to a series of periodic performances by defendant. Cf. Hatter, 203 F.3d at 799-800; Brown Park, 127 F.3d at 1457-58; Friedman, 159 Ct. Cl. at 6-8, 310 F.2d at 384-85. Instead, plaintiff states that although it owed "periodic drainage payments" pursuant to the 1963 Contract and 1965 Repayment Contract, neither contract "provide[d] a definite time for the Government to provide a complete drainage system, or even discrete segments of one"--in other words, that no "reciprocal" periodic performance was due from defendant. Pl.'s Resp. 38-39. In addition, the injuries alleged by plaintiff stem from the continued ill effects of suspension in or around 1978 of phases two and three of the construction contemplated by the 1965 Repayment Contract and the 1986 closing of the limited drainage provided to Westlands. See supra pp. 40-41 (discussing when injuries complained of by plaintiff first accrued); Pl.'s Resp. 45-46 (listing injuries and stating that "Westlands suffered substantial damages from the Government's continuing failure to provide drainage during the six years prior to the filing of the Complaint"); cf. Brown Park, 127 F.3d at 1456 (stating that the continuing claims doctrine does not apply to claims based on the continuing effects of a single, distinct event).

Finally, all of the events necessary to fix liability for plaintiff's breach of contract claims occurred outside the statute of limitations, that is, before January 6, 2006. Cf. Brighton Vill. Assocs., 52 F.3d at 1060 (stating that a claim first accrues "when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action." (internal quotation marks omitted)); Dalles Irrigation Dist., 88 Fed. Cl. at 612-13 (finding that an alleged breach by the Bureau of Reclamation of its duty to grant surplus credits for historical overcharges was not renewed each year because all events to fix liability would have occurred the first time such a credit was not granted).

The continuing claims doctrine is therefore inapplicable to plaintiff's breach of contract claims.[18]

ii. 2007 and 2010 Interim Contracts

With respect to the 2007 and 2010 Interim Contracts, plaintiff does not allege any specific instances of breach, but instead states that the contracts "carried forward" the purported drainage obligation, Pl.'s Resp. 14 (capitalization and emphasis omitted); see id. at 16, which it claims has been "continuously breached . . . since at least 1986," Compl. ¶ 133. To the extent that any of the events alleged in the pleadings to have occurred after January 6, 2006 can be understood to be alleged as breaches of the 2007 Interim Contract or 2010 Interim Contract, such claims would survive the statute of limitations. See 28 U.S.C. § 2501. Still, because plaintiff has failed to show any duty arising from those contracts that potentially could be breached by such actions, see supra Part III.A.1a.iii-iv, these claims do not survive defendant's motion.

b. Claim Three: Breach of the Implied Obligation of Good Faith and Fair Dealing

[18] Plaintiff also cites Franconia Assocs. v. United States (Franconia), 536 U.S. 129 (2002), which it claims is "instructive" for purposes of its continuing claims argument, Pl.'s Resp. 41-42. However, the Supreme Court in that case considered when a breach of contract claim accrued in the case of repudiation by the government, not whether the continuing claims doctrine applied. See Franconia, 536 U.S. at 149. Specifically, in Franconia the government's contractual obligation to accept prepayment on certain loans was repudiated by statute. Id. at 143-44. The government argued that the plaintiffs' claims first accrued when the statute was passed, nine years before the case was filed, and that, therefore, the plaintiffs' claims were barred by the statute of limitations. See id. at 138-39. The Court rejected the government's argument that a repudiation claim against the government accrues at the time of repudiation, stating the general rule that, when a party repudiates a contractual duty, the time when a claim accrues depends on whether the party chooses to treat the repudiation as a present breach or waits until the time for performance is due. Id. at 144-45. The court concluded that because the plaintiffs had not treated the passage of the statute as a present breach, no claim accrued until prepayment was attempted--because only then would government performance of the obligation to accept prepayments be due. Id. at 143. Therefore, the Court held that a plaintiff's claim was timely if filed within six years of that plaintiff's tender of a rejected prepayment. Id. at 149. It did not consider whether, with respect to a plaintiff's prepayments tendered more than six years before the suit was filed, claims by the same plaintiff for later tendered prepayments might be saved under the continuing claims doctrine.

Plaintiff fails to explain how Franconia relates to its continuing claims argument, and the court can discern no support for plaintiff's argument in the case.

A breach of the implied obligation of good faith and fair dealing occurs when a party acts in a way "specifically designed to reappropriate the benefits the other party expected to obtain from [the contract], thereby abrogating [its] obligations under the contract." Precision Pine, 596 F.3d at 829 (citing Centex, 395 F.3d at 1311). Plaintiff alleges that the government breached this obligation with respect to a purported drainage duty arising under the 1963 Contract, 1965 Repayment Contract, 2007 Interim Contract, 2010 Interim Contract and any implied contract by: not timely designing, developing and implementing a plan for adequate drainage--both initially and in response to court orders in Firebaugh and Sumner Peck--and failing to devote adequate resources and to seek necessary appropriations from Congress for these tasks; abandoning its original drainage plan and "any effort to provide drainage to the entire San Luis Unit and all of the lands in Westlands' service area in need of drainage"; designing and constructing an inadequate drainage system that led to the closing of the Kesterton Reservoir; closing the completed portion of the interceptor drain; "and ultimately abandoning its obligation altogether" in the Feinstein Letter. Compl. ¶ 147.

To the extent that any of these alleged breaches of the implied obligation of good faith and fair dealing took place after January 6, 2006, these claims would survive the statute of limitations. See 28 U.S.C. § 2501. However, because plaintiff has failed to show any contractual drainage obligation to which the implied obligation of good faith and fair dealing could attach, see supra Part III.A.2.a, these claims do not survive defendant's motion.

c. Claim Four: Total Breach

Plaintiff argues that the statute of limitations has not yet run on its claims for total breach because plaintiff has only now elected to sue for total breach based on defendant's "accumulated failures to perform." Pl.'s Resp. 37-38. When a party to a contract is in total breach, the non-breaching party may "elect to declare the contract terminated and sue for total breach or to continue the contract and sue for partial breach." PG&E, 70 Fed. Cl. at 771; Cities Serv. Helex, Inc., 211 Ct. Cl. at 234-35, 543 F.2d at 1313. If the nonbreaching party elects to continue performance under the contract, it is precluded from later suing for total breach. See PG&E, 70 Fed. Cl. at 771 (deriving from Hansen, 367 F.3d at 1309, that restitution damages for total breach and damages for partial breach are "inconsistent and incompatible remedies"). If the party elects to sue for total breach, the claim accrues at the time of the total breach. See Brighton Vill. Assocs., 52 F.3d at 1060 (stating that a claim accrues "'when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action'" (quoting Kinsey, 852 F.2d at 557)).

Plaintiff's argument that the statute of limitations has not yet run on its claim for total breach appears to be based on plaintiff's contention that "the Government's time to

satisfy its duty to provide drainage was indefinite." Pl.'s Resp. 38-39. As discussed above, plaintiff appears to reason, based on the finding of the Westlands I court that drainage component payments could be applied to service in later years, that no immediate obligation to perform the purported drainage obligation arose until it was no longer reasonable for plaintiff to believe that such performance would be forthcoming. See supra Part III.B.1; Pl.'s Resp. 39-40. To the extent that the court can construe plaintiff's assertion that "it finally became clear that the Government would never provide the drainage facilities required by the Contracts" in 2010, Pl.'s Resp. 40, as an allegation of total breach based on this theory, such a claim would have accrued in 2010 and would not be barred by the statute of limitations, see 28 U.S.C. § 2501; cf. Brighton Vill. Assocs., 52 F.3d at 1060 (stating that a claim accrues "when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action" (internal quotation marks omitted)). However, in making its case that the statute of limitations has not run on its claim for total breach, plaintiff undermines this claim by what appears to be a retraction of it, stating simply that "there was no breach." Pl.'s Resp. 40. While such a statement is consistent with plaintiff's accrual theory based on repudiation, see infra Part III.B.1.d; cf. Franconia, 536 U.S. at 143 ("[T]he promisor's renunciation of a 'contractual duty before the time fixed in the contract for . . . performance' is a repudiation." (emphasis in original) (quoting 4 Corbin, Contracts § 959 (1951))), it is inconsistent with a claim for total breach. Either way, plaintiff has not stated a claim for total breach on which relief can be granted because plaintiff has not shown any right to remaining performance of a contractual drainage obligation and plaintiff has accepted performance under the contracts, precluding such a claim. See supra Part III.A.2.b.

d. Claim Five: Anticipatory Breach

When a breach of contract claim is based on anticipatory breach, also known as repudiation, the claim accrues either at the time of repudiation--if the non-breaching party chooses to treat the repudiation as a present breach--or at the time when performance is due--if the nonbreaching party chooses to await performance. Franconia, 536 U.S. at 144; see Kinsey, 852 F.2d at 558. Defendant concedes that the court has jurisdiction over plaintiff's claim for anticipatory breach. Def.'s Mot. 10. The court must nevertheless determine whether such jurisdiction exists. See Steel Co., 523 U.S. at 94-95; PODS, Inc., 484 F.3d at 1365. As discussed above, plaintiff contends that performance of the purported drainage obligation was never due. See supra Part III.B.1.c; cf. Franconia, 536 U.S. at 143 (stating that a renunciation of a contractual duty before it is due is a repudiation). Thus, plaintiff's claim for anticipatory breach would have accrued at the time of the alleged repudiation. Cf. Franconia, 536 U.S. at 144.

In its Complaint, plaintiff identifies a number of events that it alleges constituted anticipatory breaches, specifically: "express and implied repudiation of an intent to

implement the 2007 record of decision," "implied repudiation demonstrated by the Government's course of conduct" in failing to provide actual drainage since 1986, and the "demonstrated (and indeed professed) inability of the government to provide drainage, as most recently exemplified in the Feinstein Letter." Compl. ¶ 158. To the extent that plaintiff can be understood to allege that a drainage obligation pursuant to the 1963 Contract, 1965 Repayment Contract or any implied contract was repudiated by defendant's actions in 1986--or at any other time before January 6, 2006--such a claim would be time-barred. See 28 U.S.C. § 2501. However, in its Response, plaintiff states that the statute of limitations did not begin to run on any of its claims "until the Government made clear its intent to abandon its drainage obligation in September of 2010 with the Feinstein letter." Pl.'s Resp. 28. To the extent that this statement may be understood to retract any allegations of repudiation prior to the Feinstein Letter, plaintiff's claim of repudiation of a contractual drainage obligation would be viewed as having allegedly occurred in 2010 and would survive the statute of limitations. However, because plaintiff has shown neither that such a contractual drainage obligation existed to be repudiated nor that the Feinstein Letter constituted a repudiation, this claims fails to survive defendant's motion. See supra Part III.A.2.c.

e. Claim Six: Declaratory Relief

Because "claims for declaratory relief necessarily derive from claims for substantive relief," the statute of limitations for the underlying action at law generally is applied to an accompanying action for declaratory relief. 26 C.J.S. Declaratory Judgments § 120 (2012). Here, plaintiff requests that, in the event that it is not granted money damages for its claims one through five, it be granted declaratory judgment "adjusting [for inflation] its obligation to pay for construction of a drainage system under the 1965 Repayment Contract or similar contracts to be executed in the future." Compl. ¶ 165; see id. at 52.[19] Plaintiff argues that such relief is warranted because of the "escalation in construction costs . . . due to the Government's breach of its obligation to build the required drainage system in a timely manner." Id. ¶ 171.

To the extent that plaintiff's claims of breach of a contractual drainage obligation survive the statute of limitations, see supra Parts III.B.1.a-d, plaintiff's claim for declaratory relief derived from those claims also survives the statute of limitations, see 26 C.J.S. Declaratory Judgments § 120. However, as discussed above, plaintiff has failed to state a claim for declaratory judgment on which relief can be granted. See supra Part III.A.3. Further, plaintiff's claim for declaratory relief is not within the court's subject matter jurisdiction, as explained below. See infra Part. III.B.2.

[19] The court cites to plaintiff's Prayer for Relief, which appears on pages fifty-one and fifty-two of its Complaint, by page number rather than paragraph number.

2. This Court Lacks Jurisdiction to Grant the Declaratory Relief Sought by Plaintiff

Plaintiff requests two types of declaratory judgment. First, plaintiff requests that, in the alternative to money damages pursuant to claims one through five, the court grant declaratory judgment pursuant to claim six, adjusting plaintiff's payment obligations related to drainage construction costs "based on inflation adjusted dollars going back to the period when the work should have been done." Compl. 52; see Pl.'s Resp. 46-47. Plaintiff also seeks declaratory relief in connection with claims four and five of the severability of defendant's contractual obligation to provide water service from its alleged contractual obligation to provide drainage, Pl.'s Resp. 46; see Compl. ¶¶ 156, 163, and an accompanying declaration that, while defendant remains obligated under its water supply contracts to supply water to Westlands and is required in good faith to negotiate for a long-term extension, plaintiff is "relieved of all further responsibility to pay for drainage services or facilities under its contracts" with defendant, both now and in future contracts extending water service, Compl. 51. Defendant argues that "Westlands'[] requests for declaratory relief are not within the jurisdiction of this Court because they are distinct from any claim for money damages and are prospective in nature." Def.'s Reply 5.

Declaratory relief, with respect to a breach of contract claim such as this one, is only within the court's jurisdiction if (1) declaratory judgment is "necessary to the resolution of a claim for money presently due and owing," Hydrothermal, 26 Cl. Ct. at 16, or (2) the declaratory judgment, "as an incident of and collateral to" a money judgment, "direct[s] restoration to office or position, placement in appropriate duty or retirement status, [or] correction of applicable records," 28 U.S.C. § 1491(a)(2). Declaratory relief is prospective, and therefore beyond the court's jurisdiction, if the consequences of adjudication would flow through the contractual scheme governing the party's relationship and have a future impact on that relationship. See Katz v. Cisneros, 16 F.3d 1204, 1209 (Fed. Cir. 1994).

Plaintiff argues that "'[t]he test for determining if a case belongs in the Claims Court is whether or not the 'prime objective' or 'essential purpose' of the complaining party is to obtain money from the federal government.'" Pl.'s Resp. 48 (quoting Eagle-Picher Indus., Inc. v. United States (Eagle-Picher) 901 F.2d 1530, 1532 (10th Cir. 1990)). Although government contracts claims generally can be brought in either the Court of Federal Claims or district court, the Court of Federal Claims has exclusive jurisdiction when the amount of the claim against the United States exceeds ten thousand dollars. 28 U.S.C. § 1346(a)(2) (2006). Here, the test discussed by plaintiff is the test used to determine whether the Court of Federal Claims (or its predecessor, the Claims Court) has exclusive jurisdiction over a suit, such that it could not be brought in district court--not whether the court has subject matter jurisdiction over a particular claim alleged in a suit.

See Eagle-Picher, 901 F.2d at 1532 ("'A party may not circumvent the Claims Court's exclusive jurisdiction by framing a complaint in the district court as one seeking injunctive, declaratory or mandatory relief where the thrust of the suit is to obtain money from the United States.'" (quoting Rogers v. Ink, 766 F.2d 430, 434 (10th Cir. 1985)); 28 U.S.C. § 1346(a)(2).

Plaintiff, apparently misunderstanding the purpose of this test, mistakenly places its reliance on cases in which an appeals court found that the Court of Federal Claims or the Claims Court had exclusive jurisdiction over a suit despite the inclusion of claims for declaratory or injunctive relief. Specifically, plaintiff compares its claim six to the facts of Colorado Department of Highways v. U.S. Department of Transportation (Colorado DOH), 840 F.2d 753 (10th Cir. 1988), and Brazos Electric Power Cooperative, Inc. v. United States (Brazos Electric), 144 F.3d 784 (Fed. Cir. 1998). See Pl.'s Resp. 49. In Colorado DOH, the plaintiff and intervenor sought money damages for purported overcharges as a result of an allegedly incorrect accounting method and also sought an injunction against the use of that accounting method in the future. Colorado DOH, 840 F.2d at 754-55. The United States Court of Appeals for the Tenth Circuit (Tenth Circuit) ordered the district court to dismiss the complaint for lack of jurisdiction, finding that the Claims Court had exclusive jurisdiction over the suit because (1) it was brought against the United States, (2) was based on a government contract and (3) was for money damages exceeding $10,000--even though it also sought injunctive relief. Id. at 756-57 (citing Rogers, 766 F.2d at 433); cf. 28 U.S.C. § 1346(a)(2). The Tenth Circuit did not hold that the Claims Court could grant the injunctive relief requested--only that the district court did not have jurisdiction to hear the case. Similarly, in Brazos Electric, the Federal Circuit affirmed a transfer order of the district court (ordering the case transferred to the Court of Federal Claims) because the plaintiff sought a cancellation of a debt owed to the federal government in excess of ten thousand dollars. Brazos Electric, 144 F.3d at 785-87. The Federal Circuit rejected the plaintiff's characterization of its claim as one for "the equitable relief of a declaration of rights and an injunction." Id. at 786. Instead, the Federal Circuit reasoned that the result of the judgment sought--that a prepayment penalty would either be refunded or credited toward the plaintiff's other debt--was "just as much a form of monetary damages for purposes of the Tucker Act as the direct payment by the federal government of conventional money damages." Id. at 787.

Relying on these cases, plaintiff first asserts that "[l]ike the relief sought in Colorado [DOH], the relief sought here would affect how reimbursements to the Government were calculated in the future." Pl.'s Resp. 49. Plaintiff continues that, "like the relief sought in Brazos [Electric], the relief sought here would relieve Westlands of an obligation to pay the Government a portion of what the Government intends to charge for construction of the drainage system." Id. However, plaintiff's comparisons are inapt. The Tenth Circuit's decision in Colorado DOH was based on the fact that the plaintiff and intervenor in that case claimed presently due and owing money damages in excess of

ten thousand dollars--and in fact were awarded $845,454.05 and $4,816,772.21, respectively. Colorado DOH, 840 F.2d at 755. Because the money damages claimed exceeded ten thousand dollars, the district court lacked jurisdiction over the entire case, even though the plaintiff and intervenor also sought injunctive relief. See id. at 755-56; cf. 28 U.S.C. § 1346(a)(2). The Tenth Circuit did not hold that the Court of Federal Claims had jurisdiction to grant declaratory judgment as to how reimbursements would be calculated in the future--making plaintiff's reliance on this case misplaced. Similarly, the court's decision in Brazos Electric turned on the fact that the plaintiff sought a refund that was presently due and owing in the amount of approximately $16.5 million. See Brazos Electric, 144 F.3d at 789. Although the plaintiff characterized its claim as one for injunctive and declaratory relief, the Federal Circuit held that it was actually a claim for money damages in excess of ten thousand dollars. Id. at 787. These cases do not stand for the proposition that the Court of Federal Claims has jurisdiction to grant declaratory relief of the type sought by plaintiff and, therefore, do not support plaintiff's argument that the court has jurisdiction to grant such relief.

Indeed, plaintiff's claim six is asserted as an alternative to money damages, see Compl. 51-52, and, therefore, cannot be said to be necessary to the resolution of a claim for money presently due and owing, cf. Hydrothermal, 26 Cl. Ct. at 16. Instead, the claim is prospective because, as plaintiff states, "it would affect how reimbursements to the Government were calculated in the future," Pl.'s Resp. 49, meaning that the consequences of such a declaratory judgment would flow through the repayment contract scheme governing the party's relationship and have a future impact on that relationship, cf. Katz, 16 F.3d at 1209. In addition, the inflation-based adjustments plaintiff seeks fall outside the three narrow situations where declaratory relief may be available "as an incident of and collateral to" a money judgment because the requested declaratory relief cannot be characterized as a "restoration to office or position, placement in appropriate duty or retirement status, [or] correction of applicable records." Cf. 28 U.S.C. § 1491(a)(2).

With respect to plaintiff's requests for declaratory relief in connection with its fourth and fifth claims (total and anticipatory breach, respectively), plaintiff argues that such relief is necessary to the resolution of these claims because the claims "are conditioned on their not resulting in release of the Government's obligation to provide water." Pl.'s Resp. 48-49.

Plaintiff misunderstands what is meant by "necessary to the resolution of a claim for money damages presently due and owing." See Hydrothermal, 26 Cl. Ct. at 16. When a plaintiff sues for anticipatory repudiation or total breach, it declares the contract terminated and sues for damages that reflect its remaining rights to performance under the contract. See Cities Serv. Helex, Inc., 211 Ct. Cl. at 234-35, 543 F.2d at 1313; PG&E, 70 Fed. Cl. at 771. Here, however, plaintiff seeks to continue receiving water

service from defendant and so is unwilling to terminate its water service contracts. See Compl. ¶¶ 156, 163 (stating that plaintiff withdraws its fourth and fifth claims if the court does not declare that the government's water service obligation is severable from the purported drainage obligation). Moreover, with respect to plaintiff's total breach claim as it relates to past contracts, plaintiff's acceptance of part performance by taking water deliveries operates as a waiver of such claims. See supra Part III.A.2.b; cf. Mobil Oil, 530 U.S. at 622 ("[A]cceptance of performance under a once-repudiated contract can constitute a waiver of the right to restitution that repudiation would otherwise create."). Plaintiff seeks a declaration of severability to overcome these problems: such a declaration would allow plaintiff to continue receiving benefits of the contracts--water service--while suing for only part of the alleged remaining performance--the drainage obligation--and would avoid the problem of waiver. However, such a declaration is not necessary to the resolution of plaintiff's claims; it is necessary only for plaintiff to prevail on them in the way that it wants. See supra Parts III.A.2.b-c (discussing plaintiff's claims four and five); cf. Hydrothermal, 26 Cl. Ct. at 16.

In addition, the declarations sought by plaintiff in connection with its claims for total and anticipatory breach are prospective because they would result in relieving plaintiff of present and future responsibilities, impacting the contractual relationship between the parties in the future. See Compl. 51 (requesting a declaratory judgment that "Westlands is relieved of all further responsibility to pay for drainage services or facilities under its contracts with the United States, including . . . future extensions" of water service contracts) (emphasis added); cf. Katz, 16 F.3d at 1209. Lastly, such declaratory relief is not incidental or collateral to money damages because it does not constitute a "restoration to office or position, placement in appropriate duty or retirement status, [or] correction of applicable records." Cf. 28 U.S.C. § 1491(a)(2).

The court, therefore, holds that it lacks subject matter jurisdiction over plaintiff's requests for declaratory judgment, and that plaintiff's claim six and requests for declaratory relief with respect to claims four and five must be dismissed. Cf. RCFC 12(h)(3) (providing that the court must dismiss claims over which it lacks jurisdiction).

3. Interest

Although plaintiff requested pre- and post-judgment interest in its Prayer for Relief, see Compl. 52, plaintiff has since conceded that the court lacks jurisdiction to grant this request, see Pl.'s Resp. 1; see also Def.'s Mot. 12 (arguing that the court lacks jurisdiction over plaintiff's interest claims). The court does not consider the issue further.

IV. Conclusion

For the reasons stated, a number of plaintiff's claims are DISMISSED-IN-PART for lack of subject matter jurisdiction pursuant to RCFC 12(b)(1) and 12(h)(3). Specifically, the statute of limitations bars the portions of plaintiff's claim one with respect to past breaches of the 1963 Contract and 1965 Repayment Contract and plaintiff's claim two of past breach of an implied contract--except to the extent that plaintiff can be understood to allege that events identified in the pleadings and occurring after January 6, 2006 constituted partial breaches. See supra Part III.B.1.a.i. Similarly, the portions of plaintiff's claim one with respect to past breaches of the 2007 and 2010 Interim Contracts are time-barred--except to the extent that events identified in the pleadings and occurring after January 6, 2006 can be understood to be alleged as breaches of either or both of the 2007 Interim Contract or 2010 Interim Contract. See supra Part III.B.1.a.ii. Plaintiff's claim three also must be dismissed as outside the limitations period except to the extent that any of the alleged breaches of the implied obligation of good faith and fair dealing occurred after January 6, 2006. See supra Part III.B.1.b. And, to the extent that plaintiff can be understood to allege that defendant's actions in 1986, or any time prior to January 6, 2006, constituted a repudiation of a contractual drainage obligation, such portions of plaintiff's claim five would also be time-barred. See supra Part III.B.1.d.

Plaintiff's claim six for declaratory relief and requests for declaratory relief associated with claims four and five are DISMISSED because they are outside the court's limited authority to grant declaratory relief, see supra Part III.B.2, and, to the extent that they derive from plaintiff's time-barred claims, they are also time-barred, see supra Part III.B.1.e.

The remainder of plaintiff's claims are DISMISSED pursuant to RCFC 12(b)(6), for failure to state a claim upon which relief can be granted. See supra Part III.A.

Defendant's Motion is therefore GRANTED. Pursuant to this Opinion, the Clerk of Court is directed to enter judgment dismissing the case.

IT IS SO ORDERED.

s/ Emily C. Hewitt
EMILY C. HEWITT
Chief Judge

EXHIBIT A

Table of Contents

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

NOTICE OF DOCKETING

13-5069 - Westlands Water District v. US

Date of docketing: March 15, 2013

Appeal from: United States Court of Federal Claims case no. 12-CV-0012

Appellant(s): Westlands Water District

Critical dates include:

- Date of docketing. See Fed. Cir. R. 12.
- Entry of appearance. (*Due within 14 days of the date of docketing*.) See Fed. Cir. R. 47.3.
- Certificate of interest. (*Due within 14 days of the date of docketing*.) See Fed. Cir. R. 47.4.
- Docketing Statement. (*Due within 30 days of the date of docketing*.) [Only in cases where all parties are represented by counsel. See the en banc order dated September 18, 2006, and guidelines available at www.cafc.uscourts.gov.]
- Requests for extensions of time. See Fed. Cir. R. 26 and 27. **N.B. Delayed requests are not favored by the court.**
- Briefs. See Fed. Cir. R. 31. **N.B. You will not receive a separate briefing schedule from the Clerk's Office.**
- **Oral Argument Schedule Conflicts:** Counsel can expect oral argument to be set within 2 months of the filing of final brief or appendix in a case. Counsel should advise the clerk's office of any potential conflict that would interfere with counsel's ability to appear for oral argument, and counsel should provide updates to inform the clerk's office of any potential conflict as it arises. The clerk's office will make every effort to accommodate counsel's conflicts if counsel so advises the clerk's office prior to the time that the clerk's office sets the date for oral argument. After the date for oral argument is set, however, the date for oral argument will not be postponed except on motion showing compelling circumstances. Counsel should be aware that the court's future oral argument schedule is posted on the court's website at www.cafc.uscourts.gov under the oral argument tab.

Pro se parties should refer to the Guide for Pro Se Petitioners and Appellants.

Attachments:

- Official caption
- Rules of Practice (to pro se parties only)
- Required forms (to pro se parties only):
  - Entry of Appearance
  - Informal Brief
  - Motion and Affidavit for Leave to Proceed in Forma Pauperis (only to appellants owing the docketing fee)

Counsel may download the Rules of Practice and required forms from www.cafc.uscourts.gov or call 202.275.8000 for a printed copy.

Jan Horbaly
Clerk

cc: US Court of Federal Claims
Katy M. Bartelma
Lawrence W. Treece

From: O'Hanlon, Daniel
Sent: Wednesday, March 20, 2013 5:30 PM
To: Diane Rathmann; Jon Rubin; cmanson@westlandswater.org; Tom Birmingham; Dan Nelson
CC: Eileen Diepenbrock; Sims, Steven O.; Bernhardt, David L.
Subject: PCFFA's Final Brief
Attachments: 68. Pacific Coast Federation Fishermen's Association's Reponse Reply Brief.pdf

Attached is a copy of PCFFA's final brief in the salmon OCAP BiOp appeal.

Dan

From: Whitman, Terri
Sent: Wednesday, March 20, 2013 3:29 PM
To: O'Hanlon, Daniel; Akroyd, Rebecca; Walter, Hanspeter; Leeper, Elizabeth
Subject: Electronic court filing - Locke Appeal - Docket No. 68

Please see attached electronic filing: **Response/Reply Brief of Defendants-Intervenors/Appellants/Cross-Appellees Pacific Coast Federation Fishermen's Association, et al.**

Nos. 12-15144, 12-15289, 12-15290, 12-15291, 12-15293 and 12-15296

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAN LUIS & DELTA-MENDOTA WATER AUTHORITY, *et al.*,
Plaintiffs/Appellees/Cross-Appellants; and

STOCKTON EAST WATER DISTRICT, *et al.*,
Plaintiffs/Appellees; and

CALIFORNIA DEPARTMENT OF WATER RESOURCES,
Plaintiff-in-Intervention/Appellee,

v.

REBECCA BLANK, ACTING SECRETARY OF COMMERCE, *et al.*,
Defendants/Appellants/Cross-Appellees; and

PACIFIC COAST FEDERATION OF FISHERMEN'S
ASSOCIATIONS/INSTITUTE FOR FISHERIES RESEARCH, *et al.*,
Defendants-Intervenors/Appellants/Cross-Appellees.

On Appeals From an Order of the United States District Court
for the Eastern District of California, No. 1:09-cv-1053-LJO-DLB

RESPONSE/REPLY BRIEF OF DEFENDANTS-INTERVENORS/APPELLANTS/CROSS-APPELLEES PCFFA, *et al.*

MICHAEL R. SHERWOOD
ERIN M. TOBIN
Earthjustice
50 California Street, Ste. 500
San Francisco, CA 94111
T: (415) 217-2000 / F: (415) 217-2040

Attorneys for Defendants-Intervenors/Appellants/Cross-Appellees

KATHERINE POOLE
DOUG OBEGI
Natural Resources Defense Council
111 Sutter St., 20th Floor
San Francisco, CA 94104
T: (415) 875-6100 / F: (415) 875-6161

Attorneys for Defendant-Intervenor/Appellant/Cross-Appellee NRDC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

REGULATIONS

FEDERAL REGISTER NOTICES

LEGISLATIVE HISTORY

GLOSSARY OF TERMS

APA	Administrative Procedure Act
BiOp	National Marine Fisheries Service's 2009 Salmonid Biological Opinion
cfs	Cubic feet per second
CVP	Central Valley Project
CVPIA	Central Valley Project Improvement Act
Def. SER	Joint Supplemental Excerpts of Record filed by Federal Defendants and Defendants-Intervenors (Appellants/Cross-Appellees) on March 20, 2013
Delta	Delta where the Sacramento and San Joaquin Rivers meet
DWR	California Department of Water Resources
DWR Br.	Brief filed by California Department of Water Resources on Nov. 7, 2012
ER	Joint Excerpts of Record filed by Federal Defendants and Defendants-Intervenors (Appellants/Cross-Appellees) on August 1, 2012
ESA	Endangered Species Act
Fed. Br.	Opening brief filed by Federal Defendants-Appellants on August 1, 2012
FWS	U.S. Fish & Wildlife Service
Handbook	Endangered Species Consultation Handbook, U.S. Fish & Wildlife Service and National Marine Fisheries Service, March 1998
MWD Br.	Brief filed by Metropolitan Water District on Nov. 7, 2012
NMFS	National Marine Fisheries Service

OMR	Old and Middle Rivers, channels of the San Joaquin River
PTM	Particle Tracking Model
Reclamation	Bureau of Reclamation
RPA	Reasonable and Prudent Alternative
SER	Supplemental Excerpts of Record filed by Export Plaintiffs and DWR
SL Br.	Brief filed by San Luis & Delta-Mendota Water Authority and Westlands Water District on Nov. 7, 2012
SWP	State Water Project
SWC Br.	Brief filed by State Water Contractors on November 7, 2012
VAMP	Vernalis Adaptive Management Plan

JURISDICTIONAL STATEMENT IN RESPONSE TO CROSS-APPEAL

Defendants-Intervenors/Appellants/Cross-Appellees Pacific Coast Federation of Fishermen's Associations/Institute for Fisheries Research, *et al.*("PCFFA") join in the Jurisdictional Statement of Defendants/Appellants/Cross-Appellees Rebecca Blank, *et al.* ("Federal Defendants") in their response/reply brief in these consolidated appeals.

ISSUES ON CROSS-APPEAL

PCFFA joins in Federal Defendants' Issues on Cross-Appeal.

SUMMARY OF ARGUMENT ON CROSS-APPEAL ISSUES

PCFFA joins in Federal Defendants' Summary of Argument on Cross-Appeal Issues.

RESPONSE TO CROSS-APPEAL

PCFFA joins in Federal Defendants' Arguments on Cross-Appeal Issues.

REPLY IN SUPPORT OF PCFFA'S APPEAL[1]

I. INTRODUCTION

The 844-page biological opinion ("BiOp") at issue in this case is the National Marine Fisheries Service's ("NMFS") expert opinion on the impacts of two of the nation's largest water storage and diversion projects on California's most imperiled salmon and steelhead populations. NMFS issued its "jeopardy" BiOp after carefully reviewing extensive scientific literature, consulting with the operators of the Central Valley Project ("CVP") and State Water Project ("SWP") (collectively, "Projects"), obtaining several rounds of scientific peer review, and accepting comments from affected parties, including many Plaintiffs in this case. Having found jeopardy, the Endangered Species Act ("ESA") compelled NMFS to exercise its scientific expertise to recommend a reasonable and prudent alternative ("RPA") to avoid or minimize the Projects' multitude of impacts on listed species.

In rejecting the BiOp, the district court failed to apply the Administrative Procedure Act's ("APA") deferential standard of review and misapplied the ESA. The court flouted the APA's record review rule by improperly accepting thousands of pages of extra-record evidence challenging aspects of the BiOp, and relying on that extra-record evidence to dispute the agency's scientific analysis. The court then misused the ESA to apply heightened scrutiny to the BiOp, disregarding the

[1] Under Federal Rule of Appellate Procedure 28(i), PCFFA joins in the arguments presented in Federal Defendants' response and reply brief.

APA standard to uphold agency decisions when their rationale may "reasonably be discerned." *Modesto Irrigation Dist. v. Gutierrez*, 619 F.3d 1024, 1035 (9th Cir. 2010). Instead, the court ordered NMFS to conduct studies and provide even more explanation of an avalanche of erroneous and misguided details raised by Plaintiffs, many of which had never been presented to NMFS in the first place. The court's rulings are unfounded.

Plaintiffs continue to flyspeck NMFS's analyses, but they do not show that NMFS ignored relevant or contrary evidence. Thus, they do not establish that NMFS violated the ESA's best available science standard or failed to provide a rational explanation for its decision. If anything, Plaintiffs highlight the erroneous standard applied by the district court by continuing to rely on extra-record evidence to support their claims and asserting that this Court must defer to the district court's factual findings—findings which should have been based on the administrative record before the court. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973) ("focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court").

Accordingly, after proper application of the correct legal standards, this Court should reject the district court's rulings and uphold the BiOp.

II. STANDARD OF REVIEW

The district court failed to apply the APA's deferential standard of review. *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 891 (9th Cir. 2002); PCFFA Br. at 4-56. Plaintiffs' response briefs reinforce the court's errors by continuing to demand studies and explanations that go well beyond what is necessary to determine whether "the agency's path may reasonably be discerned." *Modesto Irrigation Dist.*, 619 F.3d at 1035.

Northwest Coalition for Alternatives to Pesticides v. EPA, 544 F.3d 1043 (9th Cir. 2008), cited by Department of Water Resources ("DWR"), DWR Br. at 10-11, does not require further explanation of the BiOp. *Northwest Coalition* was not an ESA case, as it involved an Environmental Protection Agency ("EPA") decision to allow pesticide use under the Food Quality Protection Act ("FQPA"). The FQPA creates a presumptive 10-fold margin of safety when EPA establishes legal limits of pesticide residues on food, and EPA may only reduce that margin of safety if EPA finds that doing so is safe for infants and children. 21 U.S.C. § 346a(b)(2)(C). In *Northwest Coalition*, this Court invalidated an EPA decision to deviate from the presumptive 10-fold margin of safety because EPA failed to explain why the available data showed infants and children would be protected. 544 F.3d at 1052. Critical to this Court's ruling was the fact that accepting EPA's inadequate analysis "would abdicate [the Court's] responsibility to ensure

compliance with Congress's express desire to have a presumptive 10x child safety factor." *Id.*

Unlike the FQPA in *Northwest Coalition*, the ESA affords NMFS considerable discretion to determine what protections are needed to avoid jeopardy and adverse modification of critical habitat. The only comparable presumption in the ESA directs that when information is uncertain, NMFS must give the "benefit of the doubt to the species." *See Conner v. Buford*, 848 F.2d 1441, 1454 (9th Cir. 1988). Here, NMFS complied with the ESA's precautionary principle and did not deviate from explicit statutory requirements.

DWR also incorrectly asserts that the district court's factual findings, including those based on its review of NMFS's administrative record, are reviewed on appeal under the "clear error" standard. *See* DWR Br. at 8, 23, n.6. But review of the BiOp is under the APA, where the district court must apply the arbitrary and capricious standard of review, not make new findings of fact. *See Camp*, 411 U.S. at 142 (the "focal point" for judicial review is the agency's administrative record, "not some new record made initially in the reviewing court"). In such a case, with limited exceptions, the administrative record comprises the factual record and provides the basis for the court to determine whether NMFS "considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Friends of Endangered Species, Inc., v. Jantzen*, 760 F.2d 976,

982 (9th Cir. 1985). Thus, while a court's factual findings may be reviewed for "clear error" on appeal, where, as here, a court is reviewing an administrative record under the APA, the district court's application of the arbitrary and capricious standard is reviewed *de novo*. *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of Navy*, 898 F.2d 1410, 1414 (9th Cir. 1990).

III. THE DISTRICT COURT IMPROPERLY ADMITTED AND RELIED UPON EXTRA-RECORD EVIDENCE.

Congress entrusted NMFS with the job of protecting and restoring threatened and endangered salmon and steelhead ("salmonids"), examining the scientific data on these listed species, and making judgments based on those data. *Aluminum Co. of Am. v. Bonneville Power Admin.*, 175 F.3d 1156, 1158 (9th Cir. 1999). In reviewing NMFS's decision, a court may not "intrude upon the domain which Congress has exclusively entrusted to an administrative agency." *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943). Instead, the court's role is "to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *City & Cty. of S.F. v. U.S.*, 130 F.3d 873, 877 (9th Cir. 1997) (citation omitted). Under that standard, the district court is not to review the scientific evidence and reach its own conclusions, *Lands Council v. McNair*, 537 F.3d 981, 993-94, 1000 (9th Cir. 2008); it may not conduct *de novo* proceedings, *U.S. v. Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963); and it generally may not hear evidence and testimony to create its own record. *Camp*,

411 U.S. at 142. "Were the federal courts routinely or liberally to admit new evidence when reviewing agency decisions, it would be obvious that the federal courts would be proceeding, in effect, de novo rather than with the proper deference to agency processes, expertise, and decision-making." *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2004).

The district court ran afoul of these requirements when it admitted extensive extra-record evidence—over 25 separate declarations on summary judgment alone, totaling thousands of pages of extra-record testimony—and allowed Plaintiffs to use that evidence to challenge the correctness of NMFS's BiOp. *Asarco v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980); *Envtl. Def. Fund v. Costle*, 657 F.2d 275, 286 (D.C. Cir. 1981) (holding that "a judicial venture outside the record" can "never, under *Camp v. Pitts*, examine the propriety of the [agency's] decision itself."). As the Fourth Circuit recently held when overturning a district court's admission of *one* extra-record declaration to explain a NMFS biological opinion: "where the Fisheries Service provided a 482-page BiOp, it can hardly be argued that the administrative record was so lacking in explanations as to necessitate reliance on a litigation affidavit in conducting judicial review." *Dow AgroSciences v. Nat'l Marine Fisheries Serv.*, No. 11-2337, 2013 WL 632857, *5 (4th Cir. Feb. 21, 2013). Yet, that is precisely what Plaintiffs argue with regard to NMFS's 844-page

BiOp at issue here. Plaintiffs' arguments are baseless, and this Court should reverse the district court's decisions based on extra-record evidence.

A. The District Court Failed to Apply the Correct Legal Standards Regarding Admission of Extra-Record Evidence.

In its answering brief, the Metropolitan Water District ("MWD") concedes that "[u]nder the abuse of discretion standard, this Court will reverse a district court . . . if '[i]t based its ruling on an erroneous view of the law.'" MWD Br. at 42 (quoting *U.S. v. Hinkson*, 585 F.3d 1247, 1259 (9th Cir. 2009) (en banc), *cert. denied*, 131 S. Ct. 2096 (2011)). As the en banc panel in *Hinkson* explained, if "the question requires us to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles, then the concerns of judicial administration will favor the appellate court, and the question should be classified as one of law and reviewed de novo." *Id.* at 1260 (quoting *U.S. v. McConney*, 728 F.2d 1195, 1202 (9th Cir.1984)). Thus, the "first step" of the abuse of discretion test "is to determine de novo whether the trial court identified the correct legal rule to apply." *Id.* at 1261-62.

Here, the correct legal rule is well-settled, but was not applied by the district court. In reviewing an agency action such as this one, "judicial review normally is limited to the administrative record in existence at the time of the agency's decision." *Friends of The Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000). There are four limited exceptions to this rule; these exceptions are

narrowly applied to ensure that the exceptions do not swallow the rule. *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 943 (9th Cir. 2006); *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450-51 (9th Cir. 1996). The proponent of extra-record evidence bears the burden of demonstrating that the administrative record is inadequate and that one of the exceptions has been met. *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1437 (9th Cir. 1988) (rejecting extra-record evidence where proponent had made "no showing that the district court needed to go outside the administrative record to determine whether the [agency] ignored information.") PCFFA refers to these legal principles collectively as "the record-review rule."

The district court failed to apply the record-review rule, neither requiring Plaintiffs to demonstrate that the administrative record was lacking, nor presuming that extra-record evidence should be excluded, before admitting reams of extra-record evidence. Instead, the district court presumed the opposite—that the administrative record was necessarily incomplete and that Plaintiffs need not demonstrate its inadequacy with regard to a particular topic before admitting extra-record evidence.

The court explicitly stated its view that the 844-page "BiOp is not a document that is designed to be an educational tool" and that, therefore, adequate "explanation necessarily would not be in the BiOp." 2ER282. The court flipped

the presumption of adequacy of the administrative record on its head by presuming that the record was "necessarily" lacking.

The court further explained that "here, candidly, . . . the exceptions almost swallow the rule because of the nature of the task that is presented to the Court." 2ER281. This approach ignores this Court's repeated admonitions that the limited exceptions to the record review rule are to be "narrowly construed." *E.g.*, *Lands Council v. Powell*, 395 F.3d 1019, 1030. Moreover, the "nature of the task" presented to the district court was no different than the task presented to hundreds of courts reviewing scientific decisions of administrative agencies. The purpose of the record review rule is to prevent courts faced with this task from second-guessing the expert agency and imposing the court's own "scientific" views on the agency. *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dept. of Agric.*, 415 F.3d 1078, 1093-94 (9th Cir. 2005). The district court abandoned this approach, allowing Plaintiffs to present approximately *54 declarations* before issuing summary judgment on the ESA claims, permitting Plaintiffs' declarants to engage NMFS in a battle of the experts, and declaring winners and losers in that battle based on the court's own scientific assessment. *See* 12ER3087-3124 (Docs. 166-173, 178, 195, 197, 231, 244, 250, 356, 358, 432, 437, 439-445, 448, 452, 490, 491, 493, 494, 496, 497, 504-506, 539-549, 552, 577-581, 583).

MWD protests that the district court did not begin with these fallacious assumptions because, by the time the court made these rulings, it had already conducted multiple hearings on preliminary injunctions and temporary restraining orders ("TRO"). MWD Br. at 46-47. But, the standard for admitting evidence for a preliminary injunction or TRO request is more lenient than the standard for admitting evidence on summary judgment in an APA case. *See, e.g.*, *Nat'l Parks & Conserv. Ass'n v. Babbitt*, 241 F.3d 722, 738 (9th Cir. 2001); *see also Nat'l Wildlife Fed. v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782 (9th Cir. 2005) (upholding preliminary injunction where district court considered extra-record evidence regarding balance of hardships). Here, the relevant question is what standard did the district court apply when admitting extra-record evidence on summary judgment? That question is answered in the court's rulings on summary judgment, and the presumptions articulated by the court above that are contrary to the record review rule.

MWD's assertion that PCFFA and Federal Defendants (collectively "Defendants") only presented an "omnibus objection to the admission of extra-record evidence at the most general level," MWD Br. at 47, lacks any basis in fact. Defendants collectively submitted over 100 pages of briefing explaining in detail why thousands of pages of extra-record evidence submitted by Plaintiffs (on summary judgment alone) failed to comply with the record review rule. *See*,

e.g.,12ER3107-3119 (Docs. 398, 399, 400, 473, 473-1, 476, 483, 509, 509-1, 510, 510-1, 511, 512, 527, 528). Because of the district court's incorrect presumption that the record was lacking and extra-record evidence was permissible, Defendants were obligated to make this extensive showing despite the requirement that *Plaintiffs* bear the burden of demonstrating that extra-record evidence meets one of the four narrow exceptions to the record review rule.

The district court overruled the vast majority of Defendants' objections. While it recognized that "the appropriate time to have raised [Plaintiffs' experts' criticisms] was when [Plaintiffs] commented on the draft BiOp, not in the post-decisional extra-record declaration," the court nevertheless admitted the *post hoc* explanations, finding that "[t]here isn't a—in effect, an exclusionary standard such as in an exhaustion sense where the failure to do it precludes the evidence. And so I'm going to overrule those objections." Def. SER17-18. In fact, the record review rule is an exclusionary standard, precluding extra-record evidence unless one of the narrow exceptions applies. The district court erred by applying a different standard.

The district court similarly acknowledged that Plaintiffs' declarations presented "opinions that appear to be just quarrels in the science that the Court would not consider or rely on." Def. SER24 (Burnham). Despite this acknowledgement, the court admitted the extra-record declarations and relied on

them for the impermissible purposes of directly challenging the agency's scientific judgment and analysis. PCFFA Br. at 16-18 (Burnham).

Simply put, the district court applied the wrong legal rules regarding record review. This Court has made clear that the "function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985). That is not the approach applied by the district court, which, instead, permitted a battle of the experts, conducted a *de novo* review, and reached its own conclusions about how the Projects should be operated to avoid jeopardy. The district court's rulings admitting and relying upon extra-record evidence were erroneous and should be overturned.

B. The District Court's Ruling on Action IV.2.3 Is Based on Improperly Admitted Extra-Record Evidence and Should Be Reversed.

The district court relied entirely on extra-record evidence to overturn RPA Action IV.2.3, finding that NMFS based the Action on a "raw salvage" analysis that failed to account for population-level impacts. 791 F.Supp.2d at 825-27. However, the court's ruling was based on a misunderstanding of the purpose of Action IV.2.3, which is to protect *individual* fish from "entrainment" at the Project pumping facilities and not to prevent population-level impacts, as population-based impacts are addressed by the BiOp's incidental take limit. The extensive extra-

record testimony admitted on this question only compounded and perpetuated the court's confusion by mischaracterizing the record, rather than explaining it. That testimony should have been excluded and the faulty ruling relying on it should be reversed.

As MWD concedes, NMFS developed Action IV.2.3 "[i]n order to reduce the risk of entrainment of salmonids" in the Project pumps. MWD Br. at 18. "Action IV.2.3 attempts to accomplish the goal of reducing entrainment by managing the rate of flow in the Old and Middle River ('OMR flow'), on the theory that setting the rate of flow at certain levels will minimize entrainment." *Id.* MWD accurately concludes that there is "no dispute" that "the purpose of these analyses was to 'define the point where Project pumping caused sharply increasing loss of individual fish.'" MWD Br. at 22.

Because the point of Action IV.2.3 is to *minimize* entrainment of individual fish *regardless of population size*, a population-based analysis of entrainment impacts was not necessary to establish the Action's flow limits. As the district court found, "record explanation [exists] for an action designed to prevent large numbers of fish from being killed or harmed at the export pumping facilities." 791 F.Supp.2d at 910-11. Thus, NMFS provided a rational explanation for Action IV.2.3, and extra-record evidence was not necessary to review this action. The

district court erred by admitting and relying on extra-record evidence challenging NMFS's purported failure to analyze salvage in terms of population level impacts.

Perhaps recognizing the district court's error, MWD inappropriately attempts on appeal to challenge the court's finding that "record explanation [exists] for an action designed to prevent large numbers of fish from being killed or harmed at the export pumping facilities." 791 F.Supp.2d at 910-11. MWD urges this Court to reject NMFS's approach of minimizing the death of individual fish at the pumps by arguing that it is okay to kill more fish when "the population of juvenile salmonids . . . is more like Los Angeles, [than] like Peoria." MWD Br. at 25.

Not only is this an improper collateral attack on a finding of the district court that is not challenged on appeal, but MWD's argument ignores another aspect of the BiOp—the incidental take limit—that is established on the precise population-based grounds that MWD seeks. For example, the BiOp limits take of endangered winter-run Chinook salmon at the pumps to 2% of the juvenile production estimate for that year's winter-run population. 5ER737. In the example used by MWD, this take limit would have been hit in 1998, likely requiring more restrictive limits on pumping than the -5,000 cubic feet per seconds ("cfs") OMR limit established at the least restrictive end of Action IV.3.2's range of allowable OMR flows.

The explicit, rational, and record-supported purpose of Action IV.2.3 was different than that of the incidental take limit—it was to minimize mortality of individual fish at the pumps. Therefore, extra-record evidence challenging NMFS's supposed failure to assess population-level impacts when establishing the Action's flow limits should not have been admitted. Indeed, the administrative record, including Plaintiff DWR's "raw salvage" analyses, fully supports NMFS's approach. This Court should overturn the district court's decision to admit this evidence.

C. The District Court Improperly Admitted the Cavallo Declarations.

The district court also improperly admitted and used extra-record declarations submitted by DWR's witness Bradley Cavallo. Fed. Br. at 15-18. DWR barely attempts to defend the court's action on appeal, simply asserting that these "declarations either explain complex technical or scientific studies contained in the Salmon BiOp administrative record or respond to declarations submitted by the United States addressing complex technical or scientific subjects. As such, they are admissible under the Administrative Procedures Act (APA)." DWR Br. at 6-7. Here DWR's reliance on the Cavallo declarations demonstrates the impropriety of the district court's rulings.

First, DWR challenges NMFS's scientific determination that fishery studies on the Sacramento River show a statistically-significant relationship between

export levels and fish survival by relying on Cavallo's opinion that "[t]he use of results from fishery studies conducted on the Sacramento River to assess fish survival on the San Joaquin River is of questionable scientific value." DWR Br. at 20 n. 5. This opinion is a direct *post hoc* challenge from a competing expert to NMFS's scientific expertise. *See, e.g.*, *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1333 (9th Cir. 1992) (rejecting challenge based on extra-record declaration that "merely represent[s] a difference of scientific opinion" where agency's conclusions were "based on substantial-though not dispositive-scientific data, and not on mere speculation"). It did not explain complex scientific terms. At best, like many of Plaintiffs' declarations, Cavallo's opinion further muddies the scientific dispute by ignoring the fact that the study in question examined the Project pumps' effects on fish survival—pumps which indisputably impact fish survival in both the Sacramento and San Joaquin Rivers. *See* 11ER2737 (Newman 2008 cites Delta Action 8 studies as finding "a statistically significant negative association between exports and survival").

Second, DWR relies on Cavallo's extra-record testimony to try to discredit the prior record testimony of DWR's former staff scientist, Sheila Greene. DWR Br. at 27, n.8. Ms. Greene submitted comments to NMFS before the BiOp was completed on behalf of DWR that relied on particle tracking modeling to determine salmon movements in the Delta—just as NMFS did, and just as DWR

later criticized NMFS for doing. 7ER1833. Again, Cavallo's declaration does not shed light on complex scientific issues—it simply attempts to discredit the analysis of DWR's former staff scientist that the agency now finds inconvenient.

The district court's admission and use of Cavallo's declarations should be overturned.

IV. THE DISTRICT COURT REQUIRED STUDIES AND ANALYSES THAT ARE CONTRARY TO THE ESA AND APA.

A. The Court Erred By Requiring Further Study of the RPA Factors in 50 C.F.R. § 402.02.

When, as here, jeopardy is found, the ESA requires NMFS to "suggest" reasonable and prudent alternative agency actions that could avoid jeopardy. 16 U.S.C. § 1536(b)(3)(A). ESA regulations provide guidance to NMFS by defining an RPA as a measure that avoids jeopardy and that can be implemented by the action agency consistent with the intended purpose of the action and its legal authority, and which is economically and technologically feasible. 50 C.F.R. § 402.02. The regulation simply defines what an RPA is; it does not obligate NMFS to prepare comprehensive analyses of each of the factors. ESA regulations elsewhere identify the elements of a biological opinion, and those regulations do not require NMFS to complete studies or other analyses of the factors in 50 C.F.R. § 402.02. *See* 50 C.F.R. §§ 402.14(g)-(h).

Here, NMFS complied with 50 C.F.R. § 402.02 by explaining its conclusions as to each of the RPA factors in the BiOp itself. *See* PCFFA Br. at 42-45; 5ER1184-92. The district court's rejection of NMFS's rational and record-supported explanations is in error.

First, the court transformed NMFS's threshold RPA recommendation into a legal duty to develop comprehensive studies of the RPA's impacts on water supplied by the Projects to determine if the RPA is consistent with the intended purpose of the action. 791 F.Supp.2d at 916-17. But no law requires NMFS to prepare such studies, and courts "are not free to 'impose on the agency [their] own notion of which procedures are 'best.'" *Lands Council*, 537 F.3d at 993.

In addition, the court required NMFS to balance and prioritize economic interests over the duty to avoid jeopardy, contrary to the ESA. *See Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) ("The plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost."). Nothing in 50 C.F.R. § 402.02 authorizes the court's approach, which is contrary to the directives of the Supreme Court and Congress.

NMFS considered all of the factors in 50 C.F.R. § 402.02 and concluded that reducing Project water supplies *by at most 3 to 15 percent* to prevent possible extinction of endangered species was not inconsistent with the ESA or other legal requirements. *See San Luis Unit Food Prod. v. U.S.*, No. 11-16122, 2013 WL

765206, *9 (9th Cir., Mar. 1, 2013) ("Although the Farmers contend that the CVP is designed to promote irrigation over the protection of fish and wildlife, Congress decided otherwise."). No more is required. *See Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1023 (9th Cir. 2011) (APA requires agencies to consider all "relevant factors" and articulate a "rational connection" between the facts found and the choices made).

1. The RPA Is Consistent With the Intended Purpose of the Action.

a. The BiOp Explains How the RPA Is Consistent with the Intended Purpose of the Action.

The BiOp explains how the RPA "can be implemented in a manner consistent with the intended purpose of the action," 50 C.F.R. § 402.02. The U.S. Bureau of Reclamation ("Reclamation") defined the purpose of the proposed action as "operat[ing] the Central Valley Project (CVP) and State Water Project (SWP) to divert, store, and convey CVP and SWP (Project) water consistent with applicable law and contractual obligations." 5ER1190. NMFS accepted Reclamation's definition, and reasonably concluded that the RPA would allow the Project operators to continue to "divert, store, and convey" Project water consistent with applicable laws, including the ESA. *Id.*

Contrary to State Water Contractor's ("SWC") arguments, SWC Br. at 47, NMFS considered all of the statutory purposes of the water projects, not just

wildlife protection. Congress defined the purposes of the CVP in the Central Valley Project Improvement Act ("CVPIA"), providing that fish and wildlife "protection and restoration" are co-equal goals with irrigation and domestic uses. 5ER1190; *see also* CVPIA, § 3406(a), Pub.L. No. 102–575, 106 Stat. 4600, 4715–16 (1992); *San Luis Unit Food Producers*, No. 11-16122, 2013 WL 765206, *2. The CVPIA also requires Reclamation to operate the CVP to meet its obligations under the federal Endangered Species Act. CVPIA § 3406(b). Here, NMFS considered the potential impacts of the RPA on all of the CVPIA purposes, not just wildlife protection, including drinking water supplies, socio-economic impacts, and agricultural and urban uses. 5ER1187.

As described in the BiOp, NMFS "made many attempts through the iterative consultation process to avoid developing RPA actions that would result in high water costs, while still providing for the survival and recovery of listed species." 5ER1186. NMFS estimated the RPA's water supply impacts to be approximately five to seven percent of average annual combined exports, and it also considered "additional localized water costs" not associated with Delta exports. *Id*. NMFS considered the feasibility of modeling water costs associated with RPA actions targeted at Shasta and American River dams, but determined that it did not have the tools to do so and that any estimated costs would be highly variable and

dependent on adaptive management and, therefore, "not meaningful to model." 5ER1186-87.

Nevertheless, NMFS considered DWR's more significant estimates of water supply impacts. 5ER1186-88. DWR's predictions that the BiOp would result in a three to 15 percent reduction in water supply "were discussed in several technical team meetings and remain the only modeled projections of water costs of the RPA that NMFS is aware of." 5ER1189. While larger than NMFS's estimates, NMFS considered DWR's projections and reasoned that "the costs associated with the RPA, while not insignificant, do not render the RPA economically infeasible." 5ER1190. Thus, SWC's repeated assertions that NMFS "ignored" DWR's more significant projections of water supply impacts, SWC Br. at 48, are demonstrably false.[2]

Moreover, NMFS correctly noted that, in addition to providing water for irrigation and domestic uses, the CVPIA also "gives Reclamation broad authority to mitigate for the adverse effects of the projects on fish and wildlife." 5ER1190-91. In particular, the CVPIA set a goal of doubling the natural production of

[2] Nor did NMFS "grossly underreport" the RPA's water supply impacts, SWC Br. at 47. The BiOp disclosed both NMFS's and DWR's projections of water supply impacts. Thus, the full spectrum of available data concerning the potential impacts of the RPA on water supply were considered, disclosed and rationally explained. No more is required.

anadromous fish in Central Valley rivers and streams by 2002. 5ER1191; CVPIA, § 3406(b)(1), Pub. L. No. 102-575, 106 Stat. 4600.

All of this information informed NMFS's conclusion that the "RPA is consistent with the intended purpose of the action." 5ER1190. The district court's suggestion that NMFS only considered whether proposed operational changes would "preclude operation of the Projects," 791 F.Supp.2d at 915, is contradicted by the record.

SWC further argues that NMFS did not adequately respond to concerns raised by Reclamation and DWR. *See* SWC Br. at 48. Contrary to SWC's argument, NMFS worked closely with Reclamation and DWR throughout the consultation process, considered their comments on drafts of the biological opinion, and modified the RPA to respond to the concerns of those agencies. *See* 5ER1185-86, 1189. NMFS did not, as SWC asserts, "ignore" the agencies' comments. SWC Br. at 48.

Finally, SWC fails to distinguish relevant case-law. *Kandra v. U.S.*, 145 F.Supp.2d 1192 (D. Or. 2001), for instance, involved irrigators' challenge to an RPA that "severely limited" water available for irrigation, resulting in *no deliveries to most lands served by the irrigation project*. *Id.* at 1199 ("most project lands will receive no water deliveries"). One of the challenges raised was that the RPA was inconsistent with the irrigation purposes of the project. *Id*. at 1207. The court

rejected the consistency argument based on the fact that "agency actions taken pursuant to the Reclamation Act must comply with the requirements of the ESA." *Id.* (noting that under *TVA*, 437 U.S. at 185, ESA obligations take "priority over the 'primary' missions" of federal agencies). The court held that "Reclamation's legal duty to operate the Project consistent with its ESA and tribal trust obligations does not render the RPAs inconsistent with the Project's purpose." *Id.*

b. The Court Erred By Requiring NMFS To "Study" the Impacts of the RPA on Water Supply.

Even though the BiOp addressed DWR's estimates of water supply impacts, *see* 5ER1189, the district court was not satisfied and required NMFS to prepare additional "studies" and modeling to quantify the RPA's impacts on water supplies. 791 F.Supp.2d at 916 (asserting that NMFS "abandoned its legal duties" by failing to model impacts of the RPA). The court's ruling has no basis in law and is contrary to court cases establishing that the ESA does not require NMFS to conduct "independent studies" prior to recommending RPAs. *See Sw. Ctr. for Biological Diversity v. Babbitt*, 215 F.3d 58, 60 (D.C. Cir. 2000).

SWC does not dispute that the ESA does not require NMFS to conduct independent studies. Indeed, the ESA's best available science standard requires NMFS to evaluate the best scientific information *available to it at the time of its decision* and to consider all contrary data. *See Kern Cty. Farm Bureau v. Allen*, 450 F.3d 1072, 1080-81 (9th Cir. 2006) (rejecting "best available science" claim where plaintiffs failed to point to "evidence in the record that [the agency] ignored

relevant information") (relying on *Sw. Ctr. for Biological Diversity*, 215 F.3d at 60); *see also* PCFFA Br. at 21-22.

Rather than dispute the legal standard, SWC asserts that the district court did not require NMFS to "independently 'find better data,'" but only required NMFS to "use the data already before it." SWC Br. at 49. This is not an accurate characterization of the decision. The court rejected NMFS's explanation of why it did not model all of the components of the RPA by stating that:

> The agency *abandoned its legal duties* and said in effect: "we can't model, we won't do it." However, much of the Defendants' support for the BiOp and its RPA actions is based upon the same highly variable and questionable modeling of species populations and effects from exports. As this agency practices, what is "science" for the "goose" is clearly not "for the gander."

791 F.Supp.2d at 916 (emphasis added). The court then concluded that NMFS was required to provide "further clarification and revision in light of competent and meaningful *impact studies*." *Id*. (emphasis added).

SWC argues that NMFS could satisfy the court's command by using DWR's data, but this is exactly what NMFS did by addressing DWR's modeling in the BiOp and explaining why that information did not alter NMFS's assessment of the RPA's impacts. *See* 5ER1189. Thus, NMFS went above and beyond what the ESA requires by not only considering the available data on the impacts of the RPA on water supply, but also developing its own models and explaining why more comprehensive modeling was not possible. 5ER1186-89.

In short, NMFS fully complied with its legal duties. *See Sw. Ctr. for Biological Diversity*, 215 F.3d at 60 (ESA's best available science standard

"merely prohibits the Secretary from disregarding available scientific evidence that is in some way better than the evidence he relies on").

c. The Court Erred By Requiring NMFS To Prioritize Economic Interests Over Species' Protection.

Contrary to SWC's argument, SWC Br. at 43, the district court required NMFS to balance *and prioritize* economic and irrigation concerns over endangered species' protection. The court's ruling violates the ESA.

In analyzing whether the RPA is consistent with the intended purpose of the action, 50 C.F.R. § 402.02, the district court held that because the CVPIA contains co-equal goals to provide for irrigation and domestic use as well as to protect and restore fish and wildlife, an RPA would not be "[c]onsistent with the purposes of the action" if it "effectively eliminates Project water deliveries to parts of the CVP's service area." 791 F.Supp.2d at 916. The court likewise stated that the CVPIA "does not elevate the ESA over all other statutory purposes for use of Project water." *Id.* at 918. The court's ruling forbids implementation of an RPA that would avoid jeopardy because of its own determination of unacceptable water supply impacts and, thus, requires NMFS to prioritize irrigation needs over those of endangered species.

In *TVA*, the Supreme Court held that ESA section 7 prevents courts from balancing the equities when deciding whether to issue injunctions to remedy section 7 violations. The *TVA* court refused to overturn a lower court injunction halting construction of Tellico Dam to prevent eradication of the endangered snail darter even though the result would be "the loss of millions of unrecoverable

dollars" and public benefits, including power for 20,000 homes, flood control, and economic development. 437 U.S. at 157, 187. Despite the "burden on the public," the court held that "neither the Endangered Species Act nor Art. III of the Constitution provides federal courts with authority to make such fine utilitarian calculations." *Id*. at 187. Rather:

> [T]he plain language of the Act, buttressed by its legislative history, shows clearly that Congress viewed the value of endangered species as "incalculable." Quite obviously, it would be difficult for a court to balance the loss of a sum certain – even $ 100 million – against a congressionally declared "incalculable" value, even assuming we had the power to engage in such a weighing process, which we emphatically do not.

Id. at 187-88 (emphasis added). The court concluded that "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the *highest of priorities.*" *Id*. at 194 (emphasis added).

Contrary to the district court's ruling that the CVPIA does not "elevate" the ESA over other statutory purposes, the Supreme Court found that the *ESA* "reveals a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies." *Id*. at 185; *see also id*. ("the legislative history undergirding § 7 reveals an explicit congressional decision to require agencies to afford first priority to the declared national policy of saving endangered species").

SWC argues that *TVA* does not apply because subsequent to that decision, Congress amended the ESA in 1978 to add the RPA provision and thereby give NMFS "flexibility" that it did not otherwise have. SWC Br. at 41-43. SWC misses the point. Although *TVA* did not interpret the regulation defining an RPA, the Supreme Court's interpretation of ESA section 7 to prioritize endangered species above all other concerns—in fact, to value endangered species as literally "incalculable"—was not changed by Congress's subsequent adoption of a requirement that NMFS recommend alternatives to the proposed action. Nor did those amendments modify the ESA's requirement that federal agencies must avoid jeopardy and adverse modification above all else.

To the contrary, this Court without exception has applied *TVA* to decline to balance the equities when considering whether to issue injunctions to remedy violations of ESA section 7. *See*, *e.g.*, *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 794 (9th Cir. 2005) (holding that "courts "may not use equity's scales to strike a different balance"). Indeed, the district court itself found that, due to *TVA*'s conclusion that Congress intended to reverse species' extinctions "whatever the cost," the RPA regulation does not allow consideration of economic impacts to non-federal entities when assessing whether an RPA is "economically and technologically feasible." 791 F.Supp.2d at 921. The district

court's failure to apply this same principle to its review of the RPA's consistency with the intended purpose of the proposed action makes no sense.

SWC also misquotes legislative history to argue that Congress added the RPA provision to add "flexibility" and allow NMFS to "balance" competing interests. SWC Br. at 42-3. None of that legislative history suggests that NMFS has discretion to balance economic concerns against endangered species protection. Rather, the legislative history supports that Congress crafted a very narrowly tailored relief valve for federal projects where jeopardy cannot be avoided, by creating a cabinet-level committee with authority to exempt projects from ESA section 7. *See* 16 U.S.C. § 1536(h); 124 Cong. Rec. 21590 (1978) ("It is the intent of the Environment and Public Works Committee that *the Cabinet-level panel established by S. 2899* in evaluating alternatives examine not only engineering 'feasibility,' but also environmental and community impacts, economic feasibility and, other relevant factors.") (emphasis added) (SWC Addendum at 28). That authority was not invoked here.

Simply put, the ESA does not require NMFS to comprehensively analyze an RPA's economic and social effects before issuing a jeopardy biological opinion. *See Greenpeace v. Nat'l Marine Fisheries Serv.*, 55 F.Supp.2d 1248, 1267 (W.D. Wash. 1999) (the "conten[tion] that NMFS must balance the benefit to the species against the economic and technical burden on the industry before approving an

RPA . . . would be fundamentally inconsistent with the purposes of the ESA and with case law interpreting the Act.").

Here, NMFS *did* consider the RPA's non-wildlife impacts. Yet, while the district court acknowledged that *economic* impacts to third parties may not be assessed under *TVA*, and that the "ESA provides no guidance" on how an RPA should analyze the extent of water supply reductions that are consistent with the irrigation purpose of the Projects, it inexplicably faulted NMFS's robust analysis of those impacts as "insufficient." 791 F.Supp.2d at 916, 921. The court's decision should be reversed.

2. NMFS Explained How the RPA Is Consistent With Reclamation's Legal Authority.

The district court held that "to the extent that any RPA Action has been found unlawful, Federal Defendants cannot establish that implementation of that RPA is consistent with Reclamation's legal authority," as required by 50 C.F.R. § 402.02. 791 F.Supp.2d at 919. For the reasons set forth above, the district court erred in ruling that the RPA was unlawful, so there is no basis for the court's ruling that the RPA is inconsistent with Reclamation's legal authority.

SWC argues that the district court "also determined that NMFS's Section 402.02 analysis misapprehended the requirements and limits of the CVPIA and state water rights law," and that Defendants should have "defend[ed] the BiOp's misguided analysis on this element." SWC Br. at 52. To the contrary, the court

correctly rejected Plaintiffs' argument that NMFS failed to show that the RPA was consistent with state law, finding that California water law identifies the preservation of fish and wildlife as a beneficial use and that California State Water Board D-1641 requires Reclamation and DWR to comply with the ESA. 791 F.Supp.2d at 919, n.30. The court concluded that to "the extent individual RPA Actions are otherwise lawful, Export Plaintiffs' argument that Federal Defendants failed to demonstrate Reclamation's authority to implement those Actions is belied by D-1641, which expressly *requires* implementation of lawful RPA Actions." *Id.* at 919.

3. The District Court Correctly Upheld NMFS's Determination That the RPA As a Whole Is Economically and Technologically Feasible.

SWC argues that the district court erred in ruling that NMFS adequately explained how the RPA was economically and technologically feasible under 50 C.F.R. § 402.02. Plaintiffs misstate the law and facts, which show that NMFS addressed this factor in the BiOp, considered input from Reclamation and DWR, and explained why the RPA as a whole is both economically and technologically feasible. *See* 5ER1185-90. This Court should uphold the decision below on this point.[3]

[3] DWR's argument that one element of the RPA, Action IV.4.2., is not feasible is addressed below.

a. The ESA Does Not Require NMFS To Assess Impacts of the RPA On the Federal and State Water Contractors.

50 C.F.R. § 402.02 defines an RPA as actions that are "economically and technologically feasible." Contrary to SWC's argument, SWC Br. at 55-58, this aspect of the regulation does not require NMFS to assess the economic impacts of the RPA on federal and state water contractors or the public.

SWC admits that neither the ESA nor the ESA regulations explicitly require NMFS to consider the impacts of an RPA on third parties when determining if it is feasible. SWC Br. at 56 (noting lower court decision that the ESA regulation "does not specify whether feasibility should be limited to the economic impact on the action agencies or others affected by the agency action").

The history of NMFS's adoption of 50 C.F.R. § 402.02 suggests that the word "feasible" is intended to provide the broadest array of possible alternatives for consideration as reasonable and prudent alternatives. *See* 51 Fed. Reg. 19926, 19936 (Jun. 3, 1986) ("Reasonable and prudent alternatives must cover the full gamut of design changes that are economically and technologically feasible for an action, independent of who is sponsoring the action."). Contrary to SWC's interpretation, SWC Br. at 57, the rulemaking history does not direct NMFS to develop comprehensive economic assessments of a proposed RPA.

Case-law confirms that the regulation requires NMFS to consider only whether the RPA is economically and technologically feasible for the action agency to implement, and NMFS has no duty to consider economic impacts to other non-federal entities. *See In re Operation of the Mo. River Sys. Litig.*, 363 F.Supp.2d 1145, 1161 (D. Minn. 2004) ("the requirement that a RPA be 'economically and technologically feasible' only requires that the Corps have the resources and technology necessary to implement the RPA"), vacated in part on other grounds sub nom. *In re Operation of the Mo. River Sys. Litig.*, 421 F.3d 618 (8th Cir. 2005); *Greenpeace*, 55 F.Supp.2d at 1267 (rejecting argument that NMFS "must balance the benefit to the species against the economic and technical burden on industry before approving an RPA"); *Kandra*, 145 F.Supp.2d at 1207 ("Read in context, however, the RPAs must be economically and technically feasible *for the government to implement*") (emphasis added).

Requiring NMFS to evaluate economic impacts to the public, as Plaintiffs argue, would be "fundamentally inconsistent with the purposes of the ESA and with case law interpreting the Act." *Greenpeace*, 55 F.Supp.2d at 1267. As discussed above, the Supreme Court in *TVA* found that Congress enacted the ESA to "halt and reverse the trend toward species extinction, *whatever the cost.*" 437 U.S. at 184. As the district court correctly found, requiring NMFS to balance species protection against impacts to the affected water users would violate this

legislative intent. *See* 791 F.Supp.2d at 921 (concluding that *TVA* "directs the conclusion that economic feasibility requirement refers only to the costs to the action agency, requiring analysis of whether the corrective measures required by an RPA can be implemented from a purely budgetary perspective").

Plaintiffs have not pointed to any law that requires NMFS to consider broader community impacts when assessing feasibility. Accordingly, this Court should uphold the district court's ruling that 50 C.F.R. § 402.02 requires NMFS to consider only whether the RPA is economically and technologically feasible for the action agency to implement.

b. NMFS's Analysis of Economic and Technological Feasibility Was Reasonable.

As the district court found, the BiOp contains a "lengthy discussion" of economic and technical feasibility, including an examination of reduced water supplies, the financial costs of those reduced supplies, and project costs. 791 F.Supp.2d at 919, 921; 5ER1184-90. Plaintiffs fail to demonstrate that the district court's ruling is in error.

SWC claims that NMFS ignored the Project operators' cost concerns, SWC Br. at 58, but the BiOp proves otherwise. NMFS considered extensive comments from Reclamation and DWR, as well as two science panels, the California Department of Fish and Game, and FWS, and revised the RPA in response to feedback from these scientists and agencies. *See* 5ER1185.

Ways in which NMFS modified the RPA to respond to the Project operators' feasibility concerns include providing reasonable time to develop technologically feasible alternatives where none currently exist; providing for studies and pilot projects prior to a significant commitment of resources; using monitoring for species presence to initiate actions in order to limit the duration of export curtailments; instituting an exception to the flow restrictions for health and safety; and shortening the duration of Action IV.2.1 and Action IV.3. 5ER1185, 1189, 1110; Def. SER94-5. As the district court found, the adaptive management provisions of the RPA also ensure that feasibility concerns can be addressed during implementation of the RPA. 791 F.Supp.2d at 921; 5ER1186. The district court, thus, correctly found that Plaintiffs failed to "identify any specific technological feasibility objection that was not addressed by NMFS's adjustments to the draft RPA." 791 F.Supp.2d at 921.

NMFS also considered DWR's estimated costs of reduced water supplies of between $320 and $390 million per year. 5ER1189. As the BiOp notes, "these costs were predicated on RPA actions that were modified after March 3rd, and would have reduced water costs." *Id*. SWC ignores these modifications and incorrectly argue that NMFS justified costs to Reclamation and DWR by relying solely on the fact that 30 million acre-feet of water would be available for agricultural use statewide. SWC Br. at 59. In fact, NMFS evaluated alternative

sources of water, including water transfers, demand reduction through conservation, conjunctive use/groundwater use during droughts, wastewater reclamation and water recycling, and desalination. 5ER1188. Ultimately, NMFS concluded that 85 percent of Reclamation's costs and 95 percent of DWR's costs are reimbursed from irrigation water users. 5ER1188-89.

This case, therefore, is a far cry from the situation faced by the court in *Dow AgroSciences v. Nat'l Marine Fisheries Serv.*, No. 11-2337, 2013 WL 632857 (4th Cir. Feb. 21, 2013). In that case, the Fourth Circuit invalidated an RPA measure requiring uniform buffers for pesticide use because the biological opinion failed to include *any* analysis of the economic feasibility of the buffers. *Id*. at *12. Here, NMFS provided ample discussion of the economic feasibility of the RPA in the BiOp; Plaintiffs simply disagree with NMFS's conclusion.

Plaintiffs contend that because Reclamation and DWR provided comments objecting to aspects of the RPA as infeasible, NMFS necessarily acted arbitrarily or capriciously in adopting the RPA anyway.[4] This is not the law. To the contrary, the ESA Consultation Handbook provides that while NMFS must consider input from the Project operators as to the "feasibility" of an RPA, NMFS "retain[s] the final decision on which reasonable and prudent alternatives are included in the

[4] Notwithstanding its concerns, Reclamation provisionally accepted the BiOp, *see* 12ER3024-25, and has not at any time since then informed NMFS that it cannot comply with the RPA.

biological opinion." 12ER3023. Here, NMFS modified the RPA to address the Project operators' feasibility concerns and fully disclosed the basis for its decision. No more is required.[5]

4. The Court Erred By Rejecting NMFS's Finding That Action IV.4.2 Is Economically and Technologically Feasible.

a. DWR Has Not Shown That Achieving 75% Salvage Efficiency At the State Pumping Facilities, As Required by RPA Acton IV.4.2 Subpart (1), Is Infeasible.

DWR asserts that there is no record support for a finding that achieving 75% salvage efficiency[6] at the Skinner Fish Protection Facility fish screens by December 31, 2012, as required by Action IV.4.2 Subpart (1), is feasible. DWR Br. at 28-36. To the contrary, the record shows that achieving 75% salvage

[5] The district court held that the RPA fails to avoid jeopardy and adverse modification, as required by 50 C.F.R. § 402.02, based on the court's other findings that aspects of the RPA are arbitrary and capricious. *See* 791 F.Supp.2d at 919. SWC agrees that this ruling should only be upheld to "the extent this Court upholds the district court's rulings on the merits of the scientific and other challenges to the RPA." SWC Br. at 62. Accordingly, for the reasons already stated, the Court should reject this aspect of the district court's ruling.

[6] The Project export pumps have "fish collection facilities," the purpose of which is to screen and divert fish from entering the pumping mechanisms—*i.e.*, to "salvage" them. *See* 4ER812; 4ER816-18; PCFFA Br. at 45. Salvage efficiency represents the effectiveness of the screens in diverting fish away from the pumps. Therefore, it should exclude any fish that emigrated into the forebay and never reached the screens. The resulting salvage efficiency estimate will be higher, and more accurate, if the total number of fish used in the calculation is reduced by the number of emigrating fish to reflect the number of fish that actually reach the screens. *See* 9ER2310-11.

efficiency is not only feasible, but may well have already been achieved. *See* PCFFA Br. at 45-47. DWR's arguments lack merit.

First, the estimate of 74 ± 7% salvage efficiency made by DWR in its 2008 study, and cited by the district court and DWR, is a "conservative" estimate because some fish released in the study may not enter the fish collection facilities where fish may be salvaged. 9ER2311. As a result, 74% likely *underestimates* salvage efficiency because the calculation treats some fish that never reached the screens, and therefore were never subject to salvage, as fish that were killed by the pumping facilities. 9ER2310-11.

To correct for this underestimation, DWR ran a second calculation of salvage efficiency in which an estimated number of fish that did not make it to the screens were excluded from the calculation. 9ER2311. This second, "liberal" estimate found that fish screen salvage efficiency "was estimated to be 82 ± 7% . . . for the 2007 study period." *Id.* Thus, in this estimate (which was ignored by the district court, *see* 791 F.Supp.2d at 926), salvage efficiency is at a minimum of 75% (82 minus 7%), and ranges as high as 89% (82 plus 7%).

DWR points out that its 2008 study "noted that the error associated with [the liberal estimate] may be large." DWR Br. at 32 n.9. But there is also error associated with the conservative estimate, as the study acknowledges. 9ER2311. Indeed, DWR ran the second estimate to correct for that error. *Id.*

Taking the "conservative" and "liberal" estimates together, NMFS reasonably concluded that actual salvage efficiency was close to, if not already at, 75%, since 74% probably underestimates salvage efficiency at the pumps.

Moreover, DWR's 2008 study suggests that salvage efficiency improvements are feasible by giving concrete suggestions for ways to improve salvage efficiency. *See*, *e.g.*, 9ER2322 ("Perhaps changes to [Skinner Fish Protection Facility] operations or changes in the design of the trash rack may yield higher salvage of steelhead.").

DWR argues, however, that other record evidence shows that achieving 75% salvage efficiency is not feasible, citing its comments to NMFS on the draft biological opinion. DWR Br. at 32; 8ER1939. DWR's comment, however, states only that there is "uncertainty" as to whether 75% salvage efficiency can be achieved by December 31, 2012, and that "it is quite likely that these efforts will extend past the required implementation date." *Id.* (emphasis added). As the district court correctly concluded, "uncertainty" is not the same as "infeasibility." *See* 791 F.Supp.2d at 924. Similarly, to say that "it is quite likely that these efforts will extend past the required implementation date" is not the same as saying that it is impossible to meet the December 31, 2012 timeframe. In short, DWR's comments did not say that achieving 75% efficiency is impossible.

b. DWR Also Has Not Shown That Reducing Predation Loss in Clifton Court Forebay to 40%, As Required by RPA Action IV.4.2 Subpart (2), Is Infeasible.

DWR admits that up to 99% of all juvenile salmon passing through Clifton Court Forebay are lost due to predation by other fish and birds. DWR Br. at 37. DWR studies have determined that similar numbers of juvenile steelhead are also lost to predation in the Forebay. 9ER2312. DWR biologists have stated that these losses are not sustainable and must be reduced. 9ER2330. Before this Court, however, DWR maintains that the RPA Action designed to do just that, Action IV.4.2 Subpart (2), is not feasible. DWR's arguments are unavailing.

DWR asserts that "[t]here is no evidence in the record that reducing pre-screen loss to no more than 40% is feasible. On the contrary, the only evidence in the record regarding feasibility shows that such a reduction is infeasible." DWR Br. at 45; *id.* at 37. In support of this statement, DWR cites a single sentence from a single study, *Gingras* (1997). *Id.*; *see* 3SER680 ("Controlling predator abundance . . . is not feasible.")

While DWR's quote is accurate, DWR fails to note that the statement is not based on the study itself, the sole purpose of which was to estimate the amount of pre-screen loss due to predation in Clifton Court Forebay, but which did not address the question of the feasibility of predator abundance control in Clifton

Court Forebay.[7] *See* 3SER657 (study was "designed to estimate pre-screen loss to entrained juvenile fishes."). With the exception of the sentence quoted by DWR, nowhere in that study is the question of the feasibility of predator control mentioned or discussed, let alone studied. Nor does *Gingras* (1997) cite to any other studies in support of the statement. Thus, the statement is not based on any data or analysis and should be given little, if any, credence.

DWR goes on to argue that "DWR notified NMFS of this infeasibility in a comment letter dated March 20, 2009." DWR Br. at 46 (citing 8ER1939). However, DWR's comment letter never uses the word "infeasible" in discussing the 40% predation loss requirement. Instead, the comment letter states that "it is *highly unlikely* that predation losses could be reduced to such a level, or that this reduction could be achieved within the prescribed timeframe," and notes that predator reduction is "extremely difficult." 8ER1939 (emphasis added). That an action is "highly unlikely" or "extremely difficult," however, does not mean that it cannot be done, *i.e.*, that it is infeasible.

Indeed, in those same comments DWR urged that it be allowed to study ways in which predation could be reduced and that "this action be rewritten to develop a plan to reduce predation to the extent practicable by March 2014. . . ."

[7] DWR acknowledges that the study "did not examine operational changes [that might reduce predation by shortening the length of time salmonids remained in the Forebay], or discuss the feasibility of doing so." DWR Br. at 45.

8ER1940. NMFS revised Action IV.4.2 to adopt DWR's suggestion by requiring DWR to "immediately commence studies to develop predator methods for Clifton Court Forebay that will reduce salmon and steelhead pre-screen loss in Clifton Court Forebay to no more than 40 percent." 5ER1122. Full compliance was not required until nearly five years after the issuance of the BiOp, thus allowing for additional focused testing of predator control options in the Forebay.[8]

DWR objects to Defendants' references to the fact that NMFS has extended the deadline, from March 31, 2014, to September 2017, for DWR to achieve the 40% predation reduction. DWR Br. at 47-48. DWR complains that its letter to NMFS requesting the extension, and NMFS's reply granting it, are "extra-record evidence" that should not be considered by the Court. *Id.*

But DWR does not demonstrate that this agency exchange is not judicially noticeable, nor does DWR challenge the authenticity of its own request to NMFS for an extension, or of NMFS's response granting the extension (actions explicitly contemplated by Article IV.4.2. Subpart 2).

Instead, DWR employs a diversionary tactic by noting that "DWR sent its extension request May 1, 2011, and did not receive NMFS's official concurrence

[8] In its 2008 study, moreover, DWR had recommended that "steps . . . be taken to reduce the pre-screen loss rate of Central Valley steelhead within Clifton Court Forebay," including a predator removal program, and noted that "[p]redator removals could reduce pre-screen loss within Clifton Court Forebay." 9ER2330. Nowhere did DWR suggest that such reductions were infeasible.

granting the extension until over a year later, on July 2, 2012, less than one month before Federal Defendants' opening brief was due to this Court." DWR Br. at 48.

Aside from the unfounded insinuation that NMFS behaved improperly, the point of this observation is unclear. Certainly NMFS's delay in granting the requested extension did not prejudice DWR. The July 2, 2012, letter from NMFS states NMFS's understanding that, "DWR is proceeding with implementing its proposal, and that *this delay in NMFS concurrence has not resulted in a delay in the implementation of the proposal*." *See* http://swr.nmfs.noaa.gov/ocap/RPA_IV.4.2_NMFS_Extension_Concurrence_070212.pdf (July 2, 2012 letter to Dale Hoffman-Floerke, DWR, from Maria C. Rea, NMFS, at 1) (emphasis added).

DWR also suggests that its extension request constitutes further evidence that achieving the 40% predator loss reduction goal is infeasible, because in the request "DWR continues to maintain that even with these changes, 'it is uncertain that the loss rate will decrease to 40%.'" DWR Br. at 49.

As with the case of DWR's comments to NMFS on the draft biological opinion, however, DWR's extension request nowhere states that achieving the 40% reduction is *infeasible*, but merely that it is "uncertain." Uncertainty is not the same as infeasibility.

To the contrary, in requesting additional time to accomplish the reduction of predator loss and detailing specific actions as part of an Implementation Plan the

agency plans to take to achieve the reduction during the extended time period, DWR implies that the agency *can* achieve the goal, given the additional time. *See* http://swr.nmfs.noaa.gov/ocap/RPA_IV.4.2_DWR_Extension_Request_050111.pdf (May 1, 2011 letter to Maria Rea, NMFS, from Dale Hoffman-Floerke, DWR), Attachment 1.

Indeed, the "infeasibility" argument is not based on any DWR statements or evidence that complying with Action IV.4.2 is infeasible. Thus, DWR counsel's arguments are not supported by DWR, much less the record for this case. Accordingly, this Court should reject them.

B. The Court Erred By Requiring NMFS To Support the RPA With Perfect Science and Exhaustive Explanations.

The district court invalidated three components of the RPA that NMFS deemed necessary to reduce harms caused by the export of large amounts of water from the Delta: Actions IV.2.1, IV.2.3 and IV.3. *See* 791 F.Supp.2d at 897-98, 909, 911. In each case, the court found a scientific basis for restricting exports but required NMFS to provide "clearer" explanations of the numeric limits in the RPA. The court's demands for further explanations run counter to the ESA and the APA's deferential standard of review, and Plaintiffs fail to show otherwise.

1. The ESA Does Not Require Perfect Science Before NMFS May Recommend an RPA To Avoid Jeopardy To ESA-listed Species.

The ESA embodies a policy of "institutionalized caution," affording endangered species "the highest of priorities." *TVA*, 437 U.S. at 194; PCFFA Br. at 21-23. In developing biological opinions under ESA section 7, Congress directed NMFS to "use the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2). This standard requires NMFS to consider *available* evidence, and not ignore contrary evidence, and to issue biological opinions even if "the available scientific and commercial data were quite inconclusive." *Sw. Ctr. for Biological Diversity*, 215 F.3d at 60 (emphasis added, citations omitted); *see also Nat'l Wildlife Fed'n v. Babbitt*, 128 F.Supp.2d 1274, 1300 (E.D. Cal. 2000) (ESA "permits [NMFS] to take action based on imperfect data, so long as the data is the best available").

Contrary to the ruling below, the ESA does not require perfect or complete science as a predicate to NMFS suggesting an RPA. Instead, when scientific evidence is equivocal NMFS must give "the benefit of the doubt to the species." *Conner*, 848 F.2d at 1454 (quoting H.R. Conf. Rep. No. 96-697, 96th Cong., 1st Sess. 12, *reprinted in* 1979 U.S. Code Cong. & Admin. News 2572, 2576).

The district court ignored this bedrock principle, holding instead that guidance in the ESA Consultation Handbook required a more exacting explanation

of the RPA measures than would otherwise be required because NMFS was faced with uncertain science. *See, e.g.*, 791 F.Supp.2d at 897-98 (claiming that importance of Handbook requirement to explain how "each component" of an RPA is "essential" to avoid jeopardy is "heightened" by "weak" evidence supporting Action IV.2.1). The court's novel interpretation of the ESA reads too much into the Consultation Handbook, which is an "internal guidance" document, 4SER886, not a regulation with the force and effect of law. 791 F.Supp.2d at 897, n.26 (Consultation Handbook is not deserving of *Chevron* deference afforded regulations). NMFS is not required to recite the Consultation Handbook's precise language to adequately explain the RPA, nor does the Consultation Handbook burden NMFS with having to prove with absolute certainty that individual components of an RPA are "essential" to avoid jeopardy. The court's reliance on the Consultation Handbook to circumvent the ESA's clear authorization to NMFS to "take action based on imperfect data, so long as the data is the best available," *Nat'l Wildlife Fed'n*, 128 F.Supp.2d at 1300, was in error.

As demonstrated below and in Defendants' opening briefs, NMFS complied with the ESA and the Consultation Handbook in developing the RPA, explaining both how the overall scheme of the RPA and its component parts work together to avoid jeopardy and adverse modification of critical habitat. No more is required.

2. NMFS Reasonably Explained the Scientific Basis for Action IV.2.1.

The district court properly found the majority of Action IV.2.1—which limits the flow/export ratio in the San Joaquin River during April and May—adequately supported, including both the 2:1 and 3:1 ratios that apply in dry or below normal years, respectively. 791 F.Supp.2d at 898. The court's rejection of the 4:1 ratio that applies in above normal and wet years failed to give the benefit of the doubt to listed salmon and was in error. *Id*.

The administrative record—including the BiOp, supporting technical memoranda (Appendix 5 to the BiOp), and dozens of studies reviewed by NMFS during the consultation process—more than adequately explains the basis for Action IV.2.1's limits on the San Joaquin River flow/export ratio. *See* PCFFA Br. at 24-6; Feds Br. at 32-6.

Rather than give the benefit of the doubt to the species, *Conner*, 848 F.2d at 1454, the district court increased NMFS's burden to explain the available science because of its doubts about the wisdom of restricting water supplies and the potential economic impacts of doing so. *See* 791 F.Supp.2d at 897 ("The consequences of imposing a 4:1 ratio in above normal and wet years demand a clearer explanation of NMFS's rationale for imposing a 4:1 ratio").

But, the court may not impose more stringent requirements on NMFS because of the potential economic consequences of an RPA. Nothing in the ESA

or the ESA regulations requires closer scrutiny of an RPA that affects industry or economic interests. *See Greenpeac*e, 55 F.Supp.2d at 1268-69 (NMFS "is not required to pick the best option for the industry any more than for the species, [but] it must provide some analysis of the options it selects.").

Nor does the Consultation Handbook, also relied on by the court, 791 F.Supp.2d at 987, require further explanation of Action IV.2.1. The Handbook generally provides that a biological opinion must include a "thorough explanation of how each component of the [RPA] is essential to avoid jeopardy and/or adverse modification," 12ER3022. The Handbook provides guidance to NMFS staff developing biological opinions. It does not require NMFS to prove with absolute certainty that each numeric limit in a complex RPA such as this one is necessary to avoid jeopardy.

DWR's argument that NMFS was required to identify a specific scientific study proving that a 4:1 ratio is "necessary" to protect salmon on the San Joaquin river fails for the same reason. DWR Br. at 14. The ESA does not require NMFS to obtain perfect science before recommending an RPA that avoids jeopardy. To the contrary, having reasonably found jeopardy (a finding upheld by the district court) NMFS had a duty to develop an RPA based on a "reasonable evaluation of available data." *Greenpeace Action*, 14 F.3d at 1337. Thus, NMFS has discretion to exercise its own judgment in light of the available data to develop an RPA, even

if the data is not certain or conclusive, as long as NMFS reasonably explains its action.

Here, NMFS did just that. NMFS considered all of the available data and did not ignore contrary science, including the annual experiments conducted by the Vernalis Adaptive Management Program ("VAMP"), the California Department of Fish and Game's population modeling, and other studies and analyses. NMFS acknowledged that "necessary environmental conditions" were lacking in the VAMP experiments, preventing an evaluation of Action IV.2.1's 4:1 ratio. *See* 6ER1407-1408. Nevertheless, NMFS found that the available data supported more stringent protections than what would be afforded by a 2:1 ratio, which "would have provided low survival indices." 6ER1407. The only other options given the restrictions on available flows in the San Joaquin River (which were targeted at 6,000 cubic feet per second) and the minimum of 1,500 cfs export limit to protect human health and safety, were somewhere between 2:1 and 4:1. Given the need to "increase survival" of San Joaquin river salmonids, NMFS reasonably and conservatively applied a 2:1 ratio in dry years and a 3:1 ratio in below normal years, and imposed the more stringent 4:1 ratio only in above normal or wet years, ensuring that more severe limits on water exports would only occur in times of plentiful water.

While perfect science is not required, DWR is incorrect that there is *no* "evidence in the record that biologically justifies a 4 to 1 I/E ratio." DWR Br. at 15; SWC Br. at 20. The VAMP experiments, which formed the basis for Action IV.2.1, are conducted annually and support the conclusion that higher ratios increase survival. In particular, although conditions were not ideal, the VAMP 2006 Annual Technical Report compiled and analyzed data from many years and found that as the flow to export ratio increased, so did salmon survival rates. *See* 6ER1407; 6ER1404-1405. The BiOp discloses that the results of this study were confounded by poor environmental conditions and that further study and analysis would be beneficial, but NMFS is not required to study the issue indefinitely—while the species face extinction—before recommending an RPA. Indeed, the ESA does not afford the agency that luxury.

Thus, this case is not controlled by *Northwest Coalition,* 544 F.3d 1043, relied on by DWR, DWR Br. at 20-21, because, unlike that case, here NMFS has not deviated from specific statutory protections. To the contrary, NMFS has acted consistent with the ESA's policy of giving the "benefit of the doubt to the species" by adopting a range of export limits in Action IV.2.1 to protect San Joaquin River salmonids that become more stringent only when more water is available. *Conner,* 848 F.2d at 1454. NMFS's approach was eminently reasonable given the water supply concerns raised by Plaintiffs during the administrative process.

SWC goes further and challenge NMFS's rationale for all of the limits on flows/exports in Action IV.2.1, SWC Br. at 20-25, but their nitpicking of the consultation process fails to show arbitrary and capricious agency action.[9] SWC disagrees with NMFS's assessment of the scientific literature and refuses to accept that exports have *any* effect on salmon survival. *See*, *e.g.*, SWC Br. at 23 (disputing that VAMP studies find a "statistically significant relationship between Project exports and salmonid survival"). The district court properly rejected these challenges as a "dispute among experts, to which the agency is due deference" and concluded that NMFS "had some basis to reach the conclusion that some form of flow:export ratio limitation should be imposed." 791 F.Supp.2d at 894, 898 n.27; *see also Lands Council*, 537 F.2d at 100 ("When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own experts even if, as an original matter, a court might find contrary views more persuasive"). SWC's insistence that the ESA and the APA "require more," SWC Br. at 25, ignores this Court's precedents. *See, e.g.*, *Modesto Irrigation Dist.*, 619 F.3d at 1035 (upholding NMFS decision because its analysis is "reasonably be discerned").

[9] For example, SWC alleges that NMFS's explanation for why it used whole integers is *post hoc*. SWC at 20. However, SWC never raised this concern in comments on the draft biological opinion. SWC's Monday morning quarter-backing fails to demonstrate arbitrary and capricious agency action.

In short, while NMFS may be "uncertain about the effectiveness of its management measures," NMFS explained the basis for Action IV.2.1 and did not rely on "pure speculation." *Greenpeace Action*, 14 F.3d at 1337. Action IV.2.1 should be upheld.

3. NMFS Reasonably Explained the Scientific Basis for Action IV.2.3.

Contrary to the district court's ruling, 791 F.Supp.2d at 909, the BiOp contains a complete discussion of the scientific basis for Action IV.2.3's flow limits, and its reliance on available data was not arbitrary and capricious. *See* 8ER2072 (explaining NMFS's use of a particle tracking model to select Action IV.2.3's limits); 5ER1118. The court's rejection of NMFS's analysis of the data—which it acknowledged was "a matter of agency discretion," 791 F.Supp.2d at 909—failed to give the benefit of the doubt to the species or defer to NMFS's expertise, contrary to the ESA. *See* PCFFA Br. at 26-30.

Plaintiffs respond by attempting to poke holes in the science supporting Action IV.2.3, but their criticisms fail to show NMFS acted unreasonably in the face of admittedly imperfect science. To the contrary, Plaintiffs' briefs illustrate that they previously championed key scientific data that they now disparage as not the "best available science." DWR Br. at 21. Their disagreement with NMFS's ultimate conclusions, or the fact that other studies may be in conflict with NMFS's action, does not demonstrate arbitrary or unlawful action. *See Greenpeace Action*,

14 F.3d at 1337 (mere uncertainty, or the fact that evidence may be "weak," is not fatal to an agency decision).

DWR, for example, criticizes NMFS's use of the Particle Tracking Model ("PTM") to define specific limits on exports for the calendar-based portion of Action IV.2.3. DWR Br. at 23-6. The BiOp explained NMFS's use of PTM as a tool to predict how salmon respond to changes in flow, recognized its limitations, but concluded that "[e]ven if salmonids do not behave exactly as neutrally buoyant particles, the risk of entrainment escalates considerably with increasing exports, as represented by the net OMR flows." 8ER2072. Contrary to its position in this case, DWR's own staff biologist previously testified in a related case in 2008—only 9 months prior to NMFS's issuance of the Salmon BiOp—that particle tracking is the "*best available science*" to estimate the proportions of salmon emigrating through the Delta. 7ER1833 (emphasis added). The district court appropriately regarded DWR's previous admission as binding on DWR and found NMFS's use of PTM to be "a matter of agency discretion." 791 F.Supp.2d at 909. DWR's attempt to minimize its own expert's opinion of PTM in a footnote as not accounting for more recent fishery tag studies, DWR Br. at 27 n.8, is unpersuasive given that the opinion preceded the BiOp *by only 9 months*.[10]

[10] As discussed earlier, DWR's reliance on post-decisional expert testimony to attempt to discredit its own biologist's prior statement is improper under the APA and should not be relied on by this Court to uphold the ruling on Action IV.2.3.

DWR also points to additional data it claims undermines the efficacy of PTM as a modeling tool. DWR Br. at 25-6. As the district court correctly explained, NMFS considered DWR's data, discussed it with DWR, and made clear that NMFS:

> was not using PTM to predict exactly how fish were moving within these same channels, but that the information gleaned from PTM about water movement through the Delta could provide information on the vulnerability of entrainment.

791 F.Supp.2d at 900; *see also* 8ER2072.

DWR has not, and cannot, demonstrate that NMFS ignored any relevant or contrary information, so its best available science challenge must fail. *See Kern Cty. Farm Bureau*, 450 F.3d at 1080-82 (rejecting best available science claim where plaintiffs failed to point to "evidence in the record that [the agency] ignored relevant information").

MWD similarly challenges NMFS's reliance on DWR "raw salvage" data to set Action IV.2.3's -5,000 cfs flow limit, MWD Br. at 18-29, even though it had argued in comments on the draft BiOp that NMFS should use the very same salvage data. 8ER2015-2016; *see also* 4ER827-28 (Figures 6-65 and 6-66 displaying DWR comparisons of fish salvage/loss at the Projects and Old and Middle River flow levels between 1995 and 2007). As discussed earlier, in arguing that NMFS erred in relying on salmon and steelhead salvage data without taking an additional step to "scale" the salvage rates to population sizes each year,

MWD and the district court misapprehended the purpose of Action IV.2.3. Action IV.2.3 is intended to prevent large numbers of fish from being killed at the Project pumping facilities and is not designed to prevent population-level impacts. Thus, it was appropriate for NMFS to use the salvage data to establish Action IV.2.3's limits.

In addition, MWD's criticism of the salvage data is highly disingenuous given its prior comment supporting NMFS's use of the same data. On May 27, 2009—*six days prior to NMFS's issuance of the BiOp*—State Water Contractors, of which MWD is a member, 8ER2047, sent comments to NMFS arguing that NMFS should consider analyses of fish salvage data showing that the relationship between salvage and exports is a "curvilinear relationship" with a "rapid increase in fish salvage as reverse flows increase to levels greater than -5,000 cfs." 8ER2016. MWD urged that NMFS's failure to use this "publicly available data" resulted in an "overestimate [of] the actual risk of direct effects of the Project." *Id*. MWD did not present NMFS with any of the "basic statistical errors" or criticisms that they now contend invalidate Action IV.2.3, MWD Br. at 19, nor has MWD explained why it now advocates a position at odds with what it urged in its comments on the draft BiOp.

The absurdity of MWD's challenge to the salvage data it previously advocated NMFS use is compounded by the fact that the district court rejected

NMFS's use of this data based on extra-record and post-decisional analyses of Plaintiffs' expert, Dr. Deriso, that were never presented to NMFS during the consultation process. 791 F.Supp.2d at 905; *id*. at 825. Thus, NMFS was deprived of the opportunity to consider Dr. Deriso's views, respond to them, or adjust the BiOp's analysis. Plaintiffs' *post hoc* arguments should be dismissed and this Court should overturn the district court's ruling.[11]

C. The Court Erred In Rejecting NMFS's Analysis of Indirect Mortality.

The Court's failure to apply the proper legal standards is further exemplified by its rulings that, even though NMFS's jeopardy determination was "lawful," 791 F.Supp.2d at 959, NMFS is required to provide more analysis of how listed species are indirectly affected by predator species, pollution, and food limitations in the Delta. *Id.* at 869-71. Contrary to the court's rulings, the BiOp explains NMFS's conclusion that proposed Project pumping increases salmon mortality by lengthening the time migrating fish are in the Delta and exposed to predators, pollution and other stressors. 4ER840-52; 4ER898-99. Rather than defer to the

[11] Thus, it is irrelevant that the ESA does not require an opportunity for public comment on the draft BiOp, as MWD argues, MWD Br. at 27-28 n. 9, because NMFS did accept numerous comments from DWR and the contractors. See, *e.g.*, 8ER2047; 8ER1929-73 (DWR comments); 4SER877-84 (other DWR comments). In fact, Appellees San Luis & Delta-Mendota Water Authority and SWC participated in the preparation of Reclamation's and DWR's biological assessment as designated non-Federal representatives pursuant to 50 C.F.R. § 402.08. *See* Def. SER75.

expert agency, the court flyspecked NMFS's analysis and demanded quantification of the precise extent to which other stressors contributes to jeopardy. *See* PCFFA Br. at 32-4. The court exceeded the bounds of APA review.

Plaintiffs' responses fail to reconcile the district court's rulings with the deferential standard of review that applies to this case. SL Br. at 43-52; *Modesto Irrigation Dist.*, 619 F.3d at 1035 (court's task is to determine whether "the agency's path may reasonably be discerned"). The law does not require NMFS to quantify the exact percentage of harm caused by export pumping as compared to other impacts, a Herculean task given the size and scope of the Projects and the multitude of ways in which they harm salmon. *See Sw. Ctr. for Biological Diversity*, 215 F.3d at 60 (ESA section 7 "makes it clear that [NMFS] has no obligation to conduct independent studies"); *see also Am. Wildlands v. Kempthorne*, 530 F.3d 991, 998 (D.C. Cir. 2008) (section 7 "requires not only that data be attainable, but that researchers in fact have conducted the tests."); *Heartwood, Inc. v. U.S. Forest Serv.*, 380 F.3d 428, 436 (8th Cir. 2004) (section 7 "does not require an agency to conduct new studies when evidence is available upon which a determination can be made.").

Plaintiffs' contention that the court's ruling does not require NMFS to quantify the relative harms caused by Project pumping, SL Br. at 47-8, is baseless. The court rejected NMFS's analysis because NMFS did not adequately consider

"[t]o what extent the contribution of the Projects to the continued presence of these exotics contribute to the jeopardy finding," and also failed "to evaluate the impact on the Listed Species from this indirect effect at varying pumping levels." 791 F.Supp.2d at 870. The court concluded that this was "another example of the need for a realistic analysis of the relative effect from Project operations on conditions that are not related to pumping." *Id*. The only way NMFS could answer these questions is by developing quantitative assessments of the relative impacts of the different Project-related stressors on listed species, comparing those impacts to "conditions that are not related to pumping," and then *also* comparing the impacts at "varying pumping levels." *Id.* The court's dictation of acceptable scientific methodologies is exactly the kind of judicial interference in the administrative scientific process this Court has rejected. *See Lands Council*, 537 F.3d at 993 (courts may not "impose on the agency [their] own notion of which procedures are best or most likely to further some vague, undefined public good").

Plaintiffs argue that NMFS failed to explain its conclusions that the Projects will cause a "high" magnitude impact on species by exacerbating the effects of contaminants and food limitations. SL Br. at 48, 50. In so arguing, Plaintiffs ignore NMFS's findings that Project operations increase the species' exposure to harmful chemicals by prolonging their migration through the Delta. 4ER840-52; *see also* 4ER898-99.

In addition, typifying the microscopic lens through which they assess the BiOp, Plaintiffs latch on to a single entry in a Table in the BiOp summarizing the effects of the Projects on winter-run Chinook salmon to argue that the entire jeopardy opinion is arbitrary and capricious. SL Br. at 51. That entry—identifying one among 16 different ways in which Projects harm winter-run—states that the Projects reduce the productivity of juvenile winter-run due to "export of food web base" and delays in juvenile migration through the Delta caused by altered Delta hydrodynamics that increase exposure to predation, poor water quality, and contaminants. 4ER926. Plaintiffs are correct that NMFS labeled these impacts as "high" magnitude, however, they ignore that NMFS gave the evidence only "low" weight because the effects of Delta hydrodynamics on organisms is "relatively unstudied." *Id*. Thus, NMFS considered the available data, recognized its limitations, and gave lower weight to weaker evidence in its analysis. No more is required to comply with the law. *Sw. Ctr. for Biological Diversity*, 215 F.3d at 60 (NMFS may issue biological opinions even if "the available scientific and commercial data were quite inconclusive").

CONCLUSION

For the foregoing reasons, PCFFA respectfully requests that the Court reverse the district court and uphold the BiOp.

Dated: March 20, 2013

Respectfully submitted,

s/ Erin M. Tobin
ERIN M. TOBIN
MICHAEL R. SHERWOOD
Attorneys for Defendants-Intervenors/Appellants/Cross-Appellees

s/ Katherine Poole
KATHERINE POOLE
DOUG OBEGI
Attorneys for Defendant-Intervenor/Appellant/Cross-Appellee NRDC

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, that the foregoing reply brief is proportionately spaced, has a typeface of 14 points, and contains 13,754 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

Dated: March 20, 2013

s/ Erin M. Tobin
ERIN M. TOBIN
Attorney for Defendants-Intervenors/Appellants/Cross-Appellees

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 20, 2013.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that one of the participants in the case is not a registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participant:

Martha F. Bauer
Brownstein Hyatt Farber Schreck, LLP
22nd Floor
410 17th Street
Denver, CO 80202

s/ Erin M. Tobin
ERIN M. TOBIN

From: Zidlicky, Paul
Sent: Thursday, June 13, 2013 1:26 PM
To: Treece, Lawrence W.; O'Hanlon, Daniel; Craig Manson; Mathews, Mark J.; Bernhardt, David L.; Johnson, Carrie E.
CC: Martella, Roger; Keisler, Peter; Myers, Erika
Subject: FW: 13-5069 Westlands Water District v. US "Brief/Appendix or Joinder Tendered"
Attachments: Westlands Opening Brief Filed (2).pdf

Everyone:

Attached please find a copy of the brief filed on behalf of Westlands this afternoon in the Court of Appeals for the Federal Circuit.

Please let us know if you have any questions about the filing.

-Paul-

Paul J. Zidlicky
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8013

United States Court of Appeals for the Federal Circuit

Notice of Docket Activity

The following transaction was entered on 06/13/2013 at 4:01:22 PM EDT and filed on 06/13/2013

Case Name:	Westlands Water District v. US
Case Number:	13-5069
Document(s):	Document(s)

Docket Text:
BRIEF TENDERED from Appellant Westlands Water District. Title: Opening Brief of Appellant Westlands Water District. Service: 06/13/2013 by email, US mail. [86022]

Notice will be electronically mailed to:

Mr. Peter D. Keisler, -: pkeisler@sidley.com, dcefilingnotice@sidley.com
Mark J. Mathews: mmathews@bhfs.com, jcox@bhfs.com, cjohnson@bhfs.com

Katy M. Bartelma, Trial Attorney: katy.m.bartelma@usdoj.gov, national.courts@usdoj.gov, natcourts.dockets@usdoj.gov
Mr. Lawrence W. Treece, Attorney: ltreece@bhfs.com, mmarsh@bhfs.com, snewman@bhfs.com
Miss Erika Myers: erika.myers@sidley.com
Mr. Roger R. Martella, Jr., Attorney: rmartella@sidley.com

Notice will not be electronically mailed to the following persons. If appropriate, notice will be delivered by other means to:

Paul John Zidlicky, -
Sidley Austin LLP
1501 K Street, N.W.
Washington, DC 20005-1403

The following document(s) are associated with this transaction:
Document Description: Brief/Appendix or Joinder Tendered
Original Filename: Opening_Brief_Appellant.pdf
Electronic Document Stamp:
[STAMP acecfStamp_ID=1222887174 [Date=06/13/2013] [FileNumber=86022-0]
[17dcf63b07213e2527d9553ca13991409f478c50f75fa2d791ca46a0970407f5ebacdf455d533d23158d11138525c1593c624278c7d00a79bcb3e2863730a078]]

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2013-5069

WESTLANDS WATER DISTRICT,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims
in No. 12-CV-0012, Chief Judge Emily C. Hewitt.

OPENING BRIEF OF APPELLANT WESTLANDS WATER DISTRICT

Lawrence W. Treece
Mark J. Mathews
Brownstein Hyatt Farber Schreck, LLP
410 17th Street, Suite 2200
Denver, Colorado 80202
303.223.1100

Peter D. Keisler
Roger R. Martella, Jr.
Paul J. Zidlicky
Erika L. Myers
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005

Attorneys for Plaintiff-Appellant
June 13, 2013

CERTIFICATE OF INTEREST

Counsel for the appellant Westlands Water District certifies the following:

1. The full name of every party or amicus represented by me is: Westlands Water District.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is: The party named in the caption is the real party in interest.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are: Westlands Water District has no parent corporations, and no publicly held companies own any stock in Westlands Water District.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

Brownstein Hyatt Farber Schreck, LLP: Lawrence W. Treece, Mark J. Mathews

Sidley Austin LLP: Peter D. Keisler, Roger R. Martella, Jr., Paul J. Zidlicky, Erika L. Myers

June 13, 2013

/s/ Peter D. Keisler
PETER D. KEISLER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND RULE

OTHER AUTHORITY

STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5(a), no appeal from this civil action was previously before this or any other appellate court. Pursuant to Federal Circuit Rule 47(b), there are no cases pending in this or any other court that will directly affect or be directly affected by this Court's decision in the pending appeal.

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the United States Court of Federal Claims dismissing the Complaint filed by Westlands Water District ("Westlands" or "District") under RCFC 12(b)(1) and 12(b)(6). The Court of Federal Claims had jurisdiction under 28 U.S.C. § 1491(a)(1), because Westlands asserted claims for breach of contract against the United States. Final judgment was entered on January 15, 2013. (APP. A1-A57).[1] The Notice of Appeal was filed on March 14, 2013. This Court has jurisdiction under 28 U.S.C. § 1295.

[1] References to the Joint Appendix are of the form "APP. <page(s)>".

STATEMENT OF THE ISSUES

1. Whether the contracts between Westlands and the United States, which obligate Westlands to pay for both irrigation water and drainage service, require the United States to provide both irrigation water and drainage service to Westlands.

2. Whether the United States can re-litigate whether the 1963 Contract requires it to provide drainage service where it lost that same issue in *United States v. Westlands Water District*, 134 F. Supp. 2d 1111 (E.D. Cal. 2001).

3. Whether the Complaint states a claim for breach of the covenant of good faith and fair dealing based on the United States' many years of failure to comply with its contractual drainage obligations.

4. Whether Westlands may seek to establish damages under both the partial breach and continuing claims doctrines for acts or omissions occurring after January 6, 2006 and thus within the applicable six-year statute of limitations.

STATEMENT OF THE CASE

This is a breach of contract case brought by Westlands Water District. Westlands is a California water district that buys water from the federal Central Valley Project ("CVP") and distributes it to farmers within the Westlands District. The CVP is a Bureau of Reclamation ("BOR" or "Bureau") water project in California's Central Valley. The Westlands District encompasses about "600,000 acres of farmland in western Fresno and Kings Counties and serves approximately 600 family-owned

farms." Complaint ("Compl.") ¶ 27 (APP. A71). Westlands is the largest contractor within the San Luis Unit of the CVP. *Id.* ¶ 26.

In its Complaint, Westlands alleged that the United States breached its contractual obligation to provide drainage service and facilities to lands irrigated by water that the United States sells to Westlands. Under its contracts with the United States, Westlands has been paying for both irrigation water and drainage since 1979. Compl. ¶ 29 (APP. A71-72). The United States, however, has not provided drainage since 1986, *id.* ¶ 4 (APP. A63), and, in September 2010, made clear that it would not provide drainage service or facilities in the future, *id.* ¶ 122 (APP. A99).

On January 6, 2012, Westlands filed suit seeking to recover damages resulting from the United States' failure to provide drainage service or facilities. On January 15, 2013, the Court of Federal Claims (Hewitt, C.J.), dismissed Westlands' Complaint, concluding that although Westlands had a binding obligation to pay the United States for drainage service, the United States had no corresponding contractual obligation to provide drainage service to Westlands. *Westlands Water Dist. v. United* States, 109 Fed. Cl. 177, 195 (2013) ("*Westlands II*") (APP. A20-A21). On March 14, 2013, Westlands filed a timely Notice of Appeal. APP. A1562.

STATEMENT OF FACTS

This case involves claims by Westlands that the United States breached contracts with Westlands deriving from the San Luis Act of 1960. Resolution of the issues presented on appeal requires a discussion of (I) the San Luis Act of 1960, (II) the contracts between Westlands and the United States, (III) the parties' performance under those contracts, and (IV) the proceedings before the Court of Federal Claims.[2]

I. THE SAN LUIS ACT OF 1960.

The San Luis Act of 1960 ("the San Luis Act") authorized the Secretary of the Interior ("Secretary") to construct the San Luis Unit of the California Central Valley Project. Compl. ¶ 18 (APP. A67) (citing San Luis Act, Pub. L. No. 86-488, 74 Stat. 156 (1960)). The principal purpose of the San Luis Unit was to "furnish[] water for the irrigation of approximately five hundred thousand acres of land in Merced, Fresno, and Kings Counties, California." 74 Stat. at 156; *see also* Compl. ¶ 2 (APP. A62).

The San Luis Act conditioned construction of the San Luis Unit on the provision of drainage service and facilities. Compl. ¶ 18 (APP. A67). Section 1 of the Act specifically provided that "[c]onstruction of the San Luis unit shall not be

[2] The facts set forth below, which largely are taken from the Complaint and documents referenced therein, are accepted as true in reviewing whether the court below properly resolved the United States' motion to dismiss. *See Sommers Oil Co. v. United States*, 241 F.3d 1375, 1378 (Fed. Cir. 2001).

commenced until the Secretary has . . . made provision for constructing the San Luis interceptor drain to the delta designed to meet the drainage requirements of the San Luis unit" as detailed in a Department of the Interior Report. San Luis Act, § 1(a)(2), 74 Stat. at 156.

The Department of the Interior Report explained "that without drainage the soils in some portions of the San Luis Unit would, with the application of imported irrigation water, eventually become 'unsuitable for irrigation use.'" Compl. ¶ 17 (APP. A66) (quoting Department of Interior Report). In analyzing the San Luis Act, the Ninth Circuit has explained that "[i]rrigation and drainage are inherently linked" because "[a]ny water project that brings fresh water to an agricultural area must take the salty water remaining after the crops have been irrigated away from the service area." *Firebaugh Canal Co. v. United States*, 203 F.3d 568, 571 (9th Cir. 2000).

II. THE CONTRACTS.

The contractual relationship between the District and the United States is embodied in the 1963 Contract, the 1965 Contract, and a series of subsequent Interim Renewal Contracts.[3] As contemplated by the San Luis Act, these contracts

[3] This case involves a series of contracts between the United States and Westlands: a 1963 contract, entitled "Contract Between The United States and Westlands Water District Providing for Water Service" ("1963 Contract"); a 1965 contract, entitled "Contract Between the United States and Westlands Water District Providing for the Construction of a Water Distribution and Drainage Collection System" ("1965 Contract"), and several interim renewal contracts, the first of which was executed in 2007 ("2007 Contract"), followed by renewals in 2010 ("2010 Contract") and 2012

incorporate the essential requirements of irrigation water and drainage and impose binding, reciprocal obligations whereby Westlands agreed to make payments for both irrigation water and drainage service (and facilities) and the United States agreed to provide both irrigation water and drainage to Westlands.

A. The 1963 Contract.

The 1963 Contract is a long-term agreement governing the provision of irrigation water and drainage service.

In the Explanatory Recitals, the United States represents that it (1) "is constructing the San Luis Unit . . . for the purpose . . . of furnishing water for irrigation," and (2) "is providing an interceptor drain designed to meet the drainage requirements of the San Luis Unit of the Federal Central Valley Project." 1963 Contract at 1-2 (APP. A577-A158). The 1963 Contract defines "Interceptor drain" as "the physical works constructed by the United States . . . to meet the drainage requirements of the area served by the San Luis Unit which have been calculated to be one hundred fifty thousand (150,000) acre-feet per year." *Id.* at 3-4 (APP. A159-A160).[4] In turn, Westlands states that it "desires to contract . . . for the furnishing by the United States of [1] a supplemental water supply from the Project *and* [2] for

("2012 Contracts"). *See* pp. 6, 9-12*, infra*.

[4] An acre-foot is the volume of water necessary to cover one acre of land with water to a depth of one foot. *See Stockton E. Water Dist. v. United States*, 583 F.3d 1344, 1349 n.6 (Fed. Cir. 2009).

drainage service by means of the interceptor drain for which the District will make payment to the United States *upon the basis, at the rate, and pursuant to the conditions hereinafter set forth*." *Id.* at 2 (APP. A158) (emphasis added).

The 1963 Contract sets forth the applicable terms and "rate" for Westlands' receipt of "drainage service." Article 13 states that "[t]he District shall construct such drainage works as are necessary to protect the irrigability of lands within the District." *Id.*, Art. 13 (APP. A178). In turn, Article 3(g) provides that the "[d]rainage facilities of the District . . . may be connected to the interceptor drain in such capacity and at such locations as may be mutually agreed upon between the District and the United States." *Id.*, Art. 3(g) (APP. A165).

The "rate" for water *and* drainage is set forth in Article 6, which is entitled "Rate and Method of Payment for Water—Drainage Service." *Id.*, Art. 6 (APP. A168-A170). Under Article 6(a), Westlands is required to pay an applicable rate, which "may not be in excess of Eight Dollars ($8) per acre-foot and shall include [1] a drainage service component of not to exceed Fifty Cents ($0.50) for the interceptor drain and [2] water service component of not to exceed Seven Dollars and Fifty Cents ($7.50)." *Id.* (APP. A168). Under the 1963 Contract, "a drainage component was included in the water charge . . . to cover the Government's costs of operating and maintaining the drainage system." Compl. ¶ 29 (APP. A71). Interpreting Article 6(a) of the 1963 Contract, another court has concluded that "water" and "drainage

service" "were the predominant benefit of the bargain: $7.50/acre-foot for water and $0.50/acre-foot for drainage." *United States v. Westlands Water Dist.*, 134 F. Supp. 2d 1111, 1138 (2001) ("*Westlands I*").

Article 6(a) further requires that "[t]he United States shall notify the District in writing *when* the interceptor drain becomes available for service." 1963 Contract (APP. A168) (emphasis added). Thereafter, "[t]he drainage service component shall be included in the rate of payment beginning with the year following the date the District is notified that such service is available." *Id.* Article 9(d) provides that "[t]he United States may temporarily discontinue or reduce the quantity of water to be furnished to the District *or the service of the interceptor drain* as herein provided for the purpose of such investigation, inspection, maintenance, repair or replacement as may be reasonably necessary of any Project facilities used in the furnishing of water to the District . . . or to the interceptor drain." *Id.*, Art. 9 (APP. A173-A174) (emphasis added). If it does so, however, the United States must provide the District with "notice in advance" of "discontinuance or reduction." *Id.* (APP. A174).

The 40-year term of the 1963 Contract "commenc[es] with the year in which the earliest delivery date of the long-term contracts for water service from the San Luis Unit shall occur." 1963 Contract, Art. 2 (APP. A161). The 1963 Contract provides for "renewals of this contract . . . not to exceed forty (40) years each." *Id.*

B. The 1965 Contract.

The 1965 Contract is styled: "Contract Between the United States and Westlands Water District Providing for the Construction of a Water Distribution and Drainage Collection System." 1965 Contract, Title Page (APP. A280); Compl. ¶ 37 (APP. A74). In the Explanatory Recitals, the District states that "to utilize . . . the water supply made available under the [1963 Contract] and such future contracts as may be made between the United States and the District" it "desires that a water distribution *and* drainage collector system be constructed for the District by the United States." *Id.* at 2 (APP. A283). In turn, after referencing the 1963 Contract, the United States represents that it "is willing to undertake the construction of the aforementioned water distribution and drainage collector system under the conditions hereinafter set forth." *Id.* (APP. A283).

In the 1965 Contract, the United States agreed to construct a "distribution system" defined as "a water distribution and lateral system, primarily of closed pipe, including facilities for the integration of ground with surface water supplies, and a drainage collector system and related facilities." 1965 Contract, Art. 1(d) (APP. A284). Specifically, Article 2(a) provides that "the United States will expend [available funds] toward construction of a distribution system (generally as illustrated in Exhibit A)." *Id.*, Art. 2(a) (APP. A284). The "distribution system" is defined to include a "drainage collector system." *Id.*

Article 2(c) provides that the "facilities" to be constructed "will be separated into construction groups," and that the first construction group "shall include substantially all of the . . . drainage collector facilities . . . as initially required to serve the area substantially as delineated on Exhibit A." 1965 Contract, Art. 2(c) (APP. A285). Exhibit A includes a map entitled the "Drains Feasibility Plan" for the "Westlands Water District Distribution System," including the "interceptor drain." *Id.*, Exhibit A (APP. A320-323).

In exchange for the government's agreement to construct the water distribution and drainage collector facilities, Westlands agreed to "repay to the United States the actual cost of the distribution system," including "a drainage collector system and related facilities." 1965 Contract, Arts. 1(d), 4(a) & 4(b) (APP. A284, APP. A287-A289). Westlands' payment obligations extend for a period of 40 years, beginning with the completion of the individual construction group described in Article 2(c). *Id.*, Art. 4(b) (APP. A285-A289).

C. The Interim Renewal Contracts.

The obligation to provide drainage set forth in the 1963 Contract was carried forward in the Interim Renewal Contracts.

In the 2007 Contract, the United States acknowledged (1) its obligation under the San Luis Act "to provide drainage to the San Luis Unit," and (2) "that adequate drainage service is required to maintain agricultural production within certain areas

served with Project Water made available under this Contract, and all renewals thereof." 2007 Contract at 4 (APP. A202). The United States agreed, "to the extent appropriated funds are available, to develop and implement effective solutions to drainage problems in the San Luis Unit." *Id.* (APP. A202).[5]

Upon execution of the 2007 Contract, Westlands was obligated to pay $35.22 per acre-foot of water, including $0.24 per acre-foot for operation and maintenance of the "San Luis Drain." 2007 Contract, Art. 7(a) & Ex. B (APP. A222, A265). The 2007 Contract also provides that: "The Contracting Officer shall notify the Contractor [Westlands] in writing *when* drainage service becomes available. Thereafter, the Contracting Officer shall provide drainage service to the Contractor at rates established pursuant to the then-existing ratesetting policy for Irrigation Water." *Id.*, Art. 16(c) (APP. A235-A236) (emphasis added).[6]

The 2007 Contract was extended by subsequent interim renewal contracts, first in 2010, and then in 2012. *See* 2010 Contract, Art. 1(a) (APP. A276); 2012 Contracts (APP. A872, A877, A882, A887, A892, A897-A898).[7] These subsequent interim renewal contracts were designed to extend the terms and conditions of the existing

[5] The United States has not argued that the appropriated funds were inadequate, and, in any event, the Complaint alleges that the United States "fail[ed] to seek necessary appropriations from Congress." Compl. ¶ 147 (APP. A106).

[6] No new rate was adopted because no drainage service was made available to Westlands during the term of the 2007 Contract. Compl. ¶ 34 (APP. A73).

[7] The 2012 Contracts were entered into after Westlands filed suit in January 2012.

contracts by incorporating the terms of the "Existing Interim Renewal Contract," while changing the expiration date. *See* 2010 Interim Renewal Contract ¶ 1 (APP. A275-A276); 2012 Contracts ¶¶ 1 (APP. A872-A873; A877-A878; A882-A883; A887-A888; A892-A893; A897-A898). Like the 2007 Contract, the 2010 Contract obligates the District to pay for the operation and maintenance of the San Luis Drain at a rate of $0.11 per acre-foot of water. 2010 Contract, Ex. B (APP. A278).

III. THE PARTIES' PERFORMANCE UNDER THE CONTRACTS.

A. Westlands' Performance.

Under the 1963 Contract, Westlands began paying for water in late 1967 when the United States began delivering San Luis Unit water to Westlands after completion of the San Luis Canal. Compl. ¶ 20 (APP. A68). Westlands began paying the "drainage component charge" under the 1963 Contract "in approximately 1979, and continues to do so to this day, even though no drainage is provided." Compl. ¶ 29 (APP. A71). In 2007, the United States admitted "that [Westlands] has fulfilled all of its obligations under the Existing Contract [the 1963 Contract]." 2007 Contract at 3 (APP. A201). In 2010, the United States "determined that Westlands has to date fulfilled all of its obligations under the [2007 Contract]." Compl. ¶ 47 (APP. A77); *see also*, *e.g.,* APP. 872, 877 (confirming Westlands' compliance with prior interim contracts).

Likewise, "[s]ince about 1979, Westlands has made all the payments due from it under the 1965 [Contract] to repay the United States the capital cost of the Drainage Collector System." Compl. ¶ 40 (APP. A75). Westlands made these "semi-annual installment payments to the United States under the [1965 Contract] to repay the capital cost of constructing this limited portion of the drainage collector system in anticipation that the system would actually be completed according to plan." *Id.* ¶ 53 (APP. A80). Westlands continues to make those payments to this day.

B. The United States' Performance.

Since entering into the 1963 and 1965 Contracts, the United States has failed "to provide the drainage it contractually committed to supply," Compl. ¶ 48 (APP. A78); *see also id.* ¶¶ 48-69 (APP. A78-A83), and has "provided no drainage at all to Westlands since 1986," *id.* ¶ 4 (APP. A63).

1. The United States' Initial Performance.

Under the 1963 Contract, the drainage plan called for an interceptor drain to transport water northward for deposit into the Sacramento/San Joaquin River Delta. Compl. ¶ 50 (APP. A78-A79). Construction of the interceptor drain began in 1969. Compl. ¶ 51 (APP. A79). "By 1975, the San Luis Drain had been extended northward to Kesterson Reservoir, a point approximately 60 miles north of Westlands and a little less then half the distance to the planned discharge point in the Sacramento/San

Joaquin River Delta." *Id.* In 1975, the United States abandoned "construction of the San Luis Drain, citing environmental questions and concerns." *Id.*

"Since the San Luis Drain was never completed, Kesterson Reservoir became the terminal disposal site for the system, draining only 42,000 acres of Westlands' lands," out of the "approximate[ly] 300,000 acres within Westlands that was projected to ultimately need drainage." Compl. ¶ 56 (APP. A81); *id.* ¶¶ 4, 27 (APP. A63, A71). "Between 1979 and 1985, the San Luis Drain transported between 7,000 and 8,500 acre-feet of drainage water annually to the Kesterson Reservoir." *Id.* ¶ 58 (APP. A81). "[I]n 1985, as a result of environmental issues," the Secretary decided "to close Kesterson Reservoir." *Id.* ¶ 63 (APP. A82). The "shut down [of] Kesterson Reservoir" "resulted in the closure of the San Luis Drain," and the plugging of "all of the feeder drains leading to the San Luis Drain." *Id.* ¶ 64. The United States "has provided no drainage service under its contracts with Westlands since the spring of 1986 when Westlands' drainage collector drains were plugged." *Id.* ¶ 67 (APP. A83).

Pursuant to its obligations under the 1965 Contract, the United States began "construction of the first phase of the drainage collector system" in 1975 "to serve an area approximately 17,000 acres in the northeastern part of Westlands." *Id.* ¶ 52 (APP. A79). "[C]onstruction of this first phase was completed in 1979." *Id.* Westlands began making payments under the 1965 Contract in 1979. By 1981, "construction was completed on the initial drainage collector system in a 42,000 acre area of

Westlands," *id.*, by which time Westlands' farmers had installed approximately 120 miles of collector drains to drain into the Interceptor Drain, 1991 Plans Report (APP. A1014). "[T]he United States never constructed the second phase of the drainage collector system," which would have served "an additional 57,000 acres." *Id.* ¶¶ 54-55 (APP. A80) (alleging that the United States erroneously claimed that it lacked sufficient funding).

2. Drainage Litigation.

Since the late 1970s, the United States has been involved in litigation over its obligations under the 1963 Contract and the San Luis Act. Compl. ¶¶ 70-129 (APP. A83-A102).

In 1978, in the *Barcellos* Litigation, the United States claimed that the 1963 Contract was invalid because the price that Westlands was paying for water and drainage service was too low. *Id.* ¶ 70 (APP. A83). In response, landowners within the Westlands Water District filed suit to have the "$8.00 rate enforced." *Id.* ¶ 71 (APP. A83). The lawsuits were settled in 1986 in the *Barcellos* Judgment, which required the United States to perform the 1963 Contract and to "develop, adopt and submit a plan for drainage service in Westlands' service area by the end of 1991." *Id.* ¶ 74 (APP. A84).

The plan required by the *Barcellos* judgment called for drainage service facilities by the end of 1991 that were capable of transporting 60,000 to 100,000 acre feet of

subsurface drainage water per year by December 31, 2007. APP. A1046-A1047. In response to the *Barcellos* Judgment, the government issued a number of documents that purported "to be the Drainage Plan required by the *Barcellos* Judgment." Compl. ¶ 77 (APP. A85).[8] Ultimately, the government's efforts were held not to comply with the *Barcellos* Judgment's mandate. *Id.* ¶ 78 (APP. A85).

In 1988, in *Firebaugh Canal Co. v. United* States, landowners filed suit alleging that the United States violated its duty to provide drainage. Compl. ¶ 81 (APP. A86). In 1991, in *Sumner Peck Ranch, Inc. v. Bureau of Reclamation*, 823 F. Supp. 715 (E.D. Cal. 1993), other landowners also filed suit seeking various forms of relief related to drainage. Compl. ¶ 81 (APP. A86). In 1992, these two lawsuits were partially consolidated to resolve common allegations as to whether the United States was required "by law to provide drainage to lands in the San Luis Unit." *Id.* The District Court held that (i) the government had a duty to provide drainage under the San Luis Act, *id.* ¶ 85 (APP. A87), (ii) the government's obligation had not been excused, *id.* ¶ 86, and (iii) the government had "breached that duty," *id.* ¶ 87.

The Ninth Circuit affirmed, holding that the United States' failure to provide drainage violated mandatory duties "under the San Luis Act," *id.* ¶ 88 (APP. A88), and that the Government "must, 'promptly,' provide drainage to the San Luis Unit," *id.*

[8] Those documents included the 1991 Plans Report (APP. A1014), a BOR evaluation of the environmental impacts of that Report's recommendations (APP. A1303-A1306), and a "1990 Rainbow Report" (APP. A1021-A1026).

¶ 89 (quoting *Firebaugh Canal Co. v. United States*, 203 F.3d 568, 578 (9th Cir. 2000)). The Ninth Circuit explained that the denial of drainage subjected "lands within Westlands . . . to irreparable injury caused by agency action unlawfully withheld." 203 F.3d at 578.

On remand from the Ninth Circuit, the government spent nearly a decade studying and planning, during which time it repeatedly reaffirmed its obligation and commitment to provide drainage, while at the same time providing no drainage. Compl. ¶¶ 94-118 (APP. A90-A96). The government's actions have consisted of "studies, reports, new studies, new reports, the amendment of old reports, evaluations and re-evaluations." *Id.* ¶ 93 (APP. A90). For example, the 2007 Record of Decision ("ROD") proposes "to retire up to 194,000 acres of land—nearly a third of Westlands' service area—essentially admitting that its construction of the San Luis Unit without drainage has ruined those acres for agricultural use forever." *Id.* ¶ 103 (APP. A92). In 2008, the government submitted a Feasibility Report identifying further actions necessary to implement the 2007 ROD, but since then has done nothing to pursue the actions it outlined. *Id.* ¶ 105 (APP. A92).

During this time, "not a drop of water has been drained by the Government for even a single acre of land within Westlands." *Id.* ¶ 93 (APP. A90). The government's approach has provoked statements of "frustration, disappointment and incredulity" from the District Court overseeing the *Firebaugh* litigation. Compl. ¶ 119

(APP. A96); *see also id.* ¶ 121 (APP. A97-A99) (statements from Judge Wanger) ("So the Government wants to say 'Okay, we're going home,' and those of you who are out there, whether they're environmentalists, whether they're farmers, whether they are landowners, whether they are residents, 'Too bad.'").

3. September 2010 Letter from Bureau of Reclamations to Senator Feinstein.

After multiple years of repeated assurances that it remained committed to providing drainage to the San Luis Unit, the government did a complete turnabout in September 2010. Compl. ¶ 122 & Exh. A (APP. A99-A100, A115-A119).

In a letter to Senator Diane Feinstein, the Commissioner of the BOR stated that there should be a "transfer [of] responsibility for irrigation drainage to local control." Compl., Exh. A at 2 (APP. A116). According to BOR, individual water districts such as Westlands "should be required to prepare a comprehensive drainage management plan," and BOR "should be directed to stop delivery of [Central Valley Project] water that would go to parcels of land for which the district fails to provide acceptable drainage service within a specified timeframe." *Id.*

Further, BOR asserted that Westlands, in particular, "should be required to permanently retire a minimum of 200,000 acres of the most drainage impaired lands as part of the required drainage management plan," and that the volume of Central Valley Project water to Westlands should be reduced to "70 percent of the amount provided in the existing water service contract," *id.* at 3 (APP. A117). Finally, the

government suggested that water districts such as Westlands should be relieved "of all or a portion of their remaining obligation to repay the cost of existing CVP facilities," *id.*, but only if they "waive any past, current, or future drainage claims against the [United States]," *id.*

IV. THE PROCEEDINGS BELOW.

On January 6, 2012, Westlands filed a Complaint in the United States Court of Federal Claims seeking damages as a result of the "government's breach of its contractual obligation to provide drainage . . . to the lands within Westlands' service area." Compl. ¶ 130 (APP. A102) (detailing damage suffered by Westlands). As relevant here, Westlands sought damages for (i) breach of express contractual obligations, *id.* ¶¶ 131-136 (APP. A103-A104), and (ii) breach of the implied contractual obligation of good faith and fair dealing, *id.* ¶¶ 143-150 (APP. A105-A107).[9]

The United States filed a motion to dismiss asserting that there was no contractual obligation to provide drainage, and that Westlands' claims were limited to those that accrued within six years prior to the filing of the lawsuit. The Court of Federal Claims dismissed the claim of breach of express contract under RCFC

[9] Westlands also advanced a number of alternative and contingent claims. Compl. ¶¶ 137-142 (APP. A104-A105); *id.* 151-176 (APP. A107-A112). Those claims (*i.e.,* breach of implied contract, total breach, anticipatory breach, and declaratory judgment) were addressed in the decision below, but are not part of Westlands' appeal to this Court.

12(b)(6), holding that "no provision of the 1963 Contract, the 1965 Repayment Contract, the 2007 Interim Contract nor the 2010 Interim Contract creates an express contractual obligation of defendant to provide drainage to Westlands." *Westlands II*, 109 Fed. Cl. at 202 (APP. A30). The court dismissed the claim of breach of the implied contractual obligation of good faith and fair dealing principally for the same reason—*i.e.*, because it concluded that "there is no contractual drainage duty to which the implied duty of good faith and fair dealing can attach." *Id.* at 205 (APP. A34).

With regard to the statute of limitations, the Court acknowledged that any conduct that breached the 2007 and 2010 Interim Contracts would survive the statute of limitations. *Id.* at 214-15 (APP. A46). As to the 1963 Contract and the 1965 Contract, the Court ruled that, under the "partial breach" doctrine, "[t]o the extent that any reports or schedules filed in connection with the *Firebaugh* litigation and any failures to act in accordance with any of these documents, the 2010 Feinstein Letter, unsuccessful repayment contract negotiations—or any other events alleged in the pleadings to have occurred after January 6, 2006—can be understood to be alleged as partial breaches, such claims would survive the statute of limitations." *Id.* at 212 (APP. 43) (citations omitted). Finally, the Court ruled that the "continuing claims doctrine" was "inapplicable to plaintiff's breach of contract claims." *Id.* at 213-14 (APP. A46).

SUMMARY OF THE ARGUMENT

The judgment below should be reversed with respect to Westlands' claims for breach of express contract and breach of the implied covenant of good faith and fair dealing. Likewise, the judgment should be reversed to the extent that it limits Westlands' ability to recover under the partial breach and continuing claims doctrines for damages from acts or omissions that occurred on or after January 6, 2006, including the failure to provide drainage during that period.

I. The language, structure and circumstances surrounding the contracts between Westlands and the United States—the 1963 Contract, the 1965 Contract, and the subsequent Interim Contracts—demonstrate that the United States has a contractual obligation to provide both irrigation water and drainage to Westlands. Under the 1963 Contract, Westlands agreed to pay for both irrigation water and drainage, and the United States agreed in return to provide Westlands with both irrigation water and drainage. The 1963 Contract imposes binding contractual obligations with regard to drainage on both Westlands and the United States. Westlands has satisfied its contractual obligations, but the United States has not.

Moreover, under the 1965 Contract, the United States agreed to construct distribution facilities for Westlands, including a drainage collector system, that would be connected to the interceptor drain constructed by the United States. In return, Westlands agreed to repay those construction costs incurred by the United States.

Under this agreement, Westlands agreed to pay as much as $150 million to take advantage of the drainage service that the United States was contractually obligated to provide to Westlands under the 1963 Contract. Westlands' agreement to repay the United States for its construction of a drainage collector system confirms that the United States was obligated, by contract, to provide drainage to Westlands. Otherwise, the 1965 Contract would require Westlands to expend vast sums for local drainage facilities that provide Westlands no benefit in the absence of a contractual right to drainage from the United States.

The court below erred because it concluded that, with regard to drainage, the contracts imposed unilateral obligations on Westlands, but no corresponding contractual obligations on the United States. That was mistaken. Although the San Luis Act certainly imposes statutory duties on the United States, those duties are in no way *inconsistent* with reading the contracts to impose a *contractual* obligation on the United States to provide water and drainage service to Westlands.

To the contrary, the San Luis Act contemplates that the United States would enter into contracts that impose binding obligations on both of the contracting parties, such as the obligation reflected in the 1963 Contract. *See* 43 U.S.C. 511; *Westlands Water Dist. v. Firebaugh Canal*, 10 F.3d 667, 669 (9th Cir. 1993). By their terms, the contracts give Westlands the contractual right to water and drainage service

and facilities from the United States in return for Westlands' payment to the United States, under those same contracts, for both water and drainage service and facilities.

Indeed, as shown in Section I.B, in prior litigation, the United States lost the issue of whether the 1963 Contract obligates it to provide drainage service to Westlands. *Westlands I*, 134 F. Supp. 2d 1111. Under principles of issue preclusion, the United States should not be permitted to re-litigate that issue here.

But even if it could, the judgment below should be reversed because the court was wrong in concluding that the contracts unambiguously do not obligate the government to provide drainage. Indeed, the Court in *Westlands I* reached precisely the opposite conclusion, holding that the contracts impose a contractual obligation to provide drainage service to Westlands. At a minimum, the court below was wrong in concluding that the contracts unambiguously do not impose a contractual obligation on the government to provide drainage. The judgment accordingly should be reversed even if the reading of the contracts adopted by the court below were a reasonable one—which it is not—because that reading is neither the only reasonable, nor the best, reading of these contracts.

It follows that the dismissal of Westlands' claim for breach of the implied covenant of good faith and fair dealing also should be set aside because that aspect of the court's decision turned on its view that there was no contractual obligation to provide drainage to which the covenant of good faith and fair dealing could attach.

The Complaint sets forth ample allegations of the United States' breach of this covenant in its years of failure and refusal to provide drainage to Westlands.

II. The court below appeared to conclude that, if there were a contractual obligation to provide drainage, Westlands would not be barred by the statute of limitations from seeking damages based on acts or omissions that occurred on or after January 6, 2006. Westlands requests clarification that it may seek damages under the partial breach doctrine based upon the United States' failure to provide drainage during the period after January 6, 2006. Lastly, the court below erred in ruling that Westlands could not seek damages under the continuing claims doctrine because this is a case "involving agency discretion." That is mistaken because the United States has no discretion to deny Westlands all drainage service, and thus its conduct falls comfortably within the parameters of the continuing claims doctrine as well.

ARGUMENT

This Court reviews *de novo* the trial court's dismissal for failure to state a claim. *Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1049 (Fed. Cir. 2012). The Court accepts as true all well-pled allegations of the complaint, and construes them in the light most favorable to the plaintiff, drawing all reasonable inferences in plaintiff's favor. *Cambridge v. United States,* 558 F.3d 1331, 1335 (Fed. Cir. 2009). To survive a motion to dismiss, the complaint need only state a "plausible" claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Laguna Hermosa Corp. v. United States*, 671

F.3d 1284, 1288 (Fed. Cir. 2012). In construing a contract in the context of a 12(b)(6) motion, the motion may be granted only if the contract is both unambiguous as a matter of law, and supports the movant's position. *See Beta Sys., Inc. v. United States*, 838 F.2d 1179, 1183 (Fed. Cir. 1988).

The Court also reviews *de novo* a trial court's dismissal for lack of jurisdiction. *Sioux Honey Ass'n*, 672 F.3d at 1049. The Court assumes that the allegations in the complaint are true and construes them in plaintiff's favor. *Hamlet v. United States*, 873 F.2d 1414, 1416 (Fed. Cir. 1989) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

I. THE CONTRACTS IMPOSE AN OBLIGATION ON THE UNITED STATES TO PROVIDE DRAINAGE TO WESTLANDS.

The decision below should be reversed because the 1963 Contract, the 1965 Contract, and the Interim Renewal Contracts impose a contractual obligation on the United States to provide drainage to Westlands. At a minimum, the contracts can reasonably be read to obligate the United States to provide drainage, thereby precluding dismissal of Westlands' suit. In fact, the government is precluded from disputing that the 1963 Contract obligates it to provide drainage service. For the same reasons, the court below erred in dismissing Westlands' claim for breach of the covenant of good faith and fair dealing.

A. The Contracts Obligate the Government to Provide Drainage.

The plain language, context and circumstances surrounding the contracts demonstrate that the United States agreed to provide both irrigation water *and* drainage service to Westlands.

In interpreting a contract, a court's purpose "is to give effect to the intent of the parties." *Tri-Star Elecs. Int'l, Inc. v. Preci-Dip Durtal SA*, 619 F.3d 1364, 1367 (Fed. Cir. 2010). The court looks to the contract's "plain language," *McAbee Constr. Inc. v. United States*, 97 F.3d 1431, 1434-35 (Fed. Cir. 1996), and reads the "contract provisions . . . as part of an organic whole, according reasonable meaning to all of the contract terms" so that "no contract provision is made inconsistent, superfluous, or redundant." *Lockheed Martin IR Imaging Sys., Inc. v. West*, 108 F.3d 319, 322 (Fed. Cir. 1997).

"[A] contract is ambiguous when its language supports more than one reasonable interpretation." *City of Tacoma v. United States*, 31 F.3d 1130, 1134 (Fed. Cir. 1994); *C. Sanchez & Son Inc. v. United States*, 6 F.3d 1539, 1544 (Fed. Cir. 1993). Further, "[b]efore an interpreting court can conclusively declare a contract ambiguous or unambiguous, it must consult the context in which the parties exchanged promises [for] that context may well reveal that the terms of the contract are not, and never were, clear on their face." *Metric Constructors, Inc. v. NASA*, 169 F.3d 747, 752 (Fed. Cir. 1999).

1. The 1963 Contract.

First, the 1963 Contract creates a series of reciprocal obligations whereby Westlands agrees to pay for, and the United States agrees to provide, both water *and* drainage service.

Article 3 of the Contract both identifies the "Water to be furnished to District" and establishes the District's right to "Use of Interceptor Drain." APP. A162-A165. The Contract obligates Westlands to construct "such drainage works as are necessary to protect the irrigability of lands within the District." Art. 13 (APP. A178). Under Article 3(g), Westlands has a contractual right to connect these "[d]rainage facilities" to "the interceptor drain in such capacity and at such locations as may be mutually agreed upon between the District and the United States." *Id.* (APP. A165). The 1963 Contract defines "interceptor drain" to mean "the physical works constructed by the United States pursuant generally to [the San Luis Act]." Art. 1(d) (APP. A159-A160). The Contract thus ties Westlands' promise to build drainage facilities to the United States' reciprocal obligation to provide drainage service to Westlands.[10]

[10] The construction obligation by Westlands was substantial. Specifically, under the 1965 Contract, Westlands agreed to repay the government a sum "not in excess of One Hundred Fifty-Seven Million Forty-Eight Thousand Dollars" for its construction of, *inter alia*, a "drainage collector system and related facilities," 1965 Contract, Art. 1(d) (APP. A284), that would be used "for handling water *after* delivery thereof to the District . . . pursuant to the [1963 Contract]," *Id.*, Art. 2a (APP. A284-A285).

In turn, Article 6 sets forth the "Rate and Method of Payment for Water—Drainage Service." 1963 Contract, Art. 6 (APP. A168-A170). The "rate of payment to be made by the District" "may not be in excess of Eight Dollars ($8) per acre-foot and *shall include a drainage service component* of not to exceed Fifty Cents ($0.50) for the interceptor drain and a water service component of not to exceed Seven Dollars and Fifty Cents ($7.50)." *Id.,* Art. 6(a) (APP. A168) (emphasis added). Because drainage service would not be available immediately, the United States agreed that it would "notify the District in writing *when* the interceptor drain becomes available for service." *Id.* (emphasis added). Thereafter, "[t]he drainage service component *shall* be included in the rate of payment beginning with the year following the date the District is notified that such service is available." *Id.* (emphasis added). It would be unreasonable to read the 1963 Contract to require Westlands to pay a "drainage service component" of "$0.50 per acre-foot" (which it has been paying since 1979) if the United States had no corresponding contractual duty to provide drainage service to Westlands. *See Lockheed*, 108 F.3d at 322.

Finally, Article 9 states that "[t]he United States may temporarily discontinue or reduce the quantity of water to be furnished to the District or the service of the interceptor drain *as herein provided* for the purpose of such investigation, inspection, maintenance, repair or replacement as may be reasonably necessary of any of the Project facilities used in the furnishing of water . . . or to the interceptor drain." 1963

Contract, Art. 9(d) (APP. A173-A174). There would be no need for authorization to "temporarily discontinue . . . the service of the interceptor drain" if the United States did not have a contractual drainage obligation.

Second, "the context in which the parties exchanged promises" further confirms that the United States agreed to provide drainage service to Westlands under the 1963 Contract. *Metric Constructors, Inc.*, 169 F.3d at 752.

Section 1 of the San Luis Act makes the provision of irrigation water contingent on the provision of drainage because irrigation without drainage would lead to degradation of the land. *See* 74 Stat. at 156. That complementary relationship between irrigation water and drainage service in the San Luis Act is likewise reflected in the reciprocal contractual obligations between the United States and Westlands in the 1963 Contract.

The parties' recitals further support a contractual obligation to pay for and provide drainage under the 1963 Act.[11] Specifically, after reciting that the government

[11] *See, e.g.*, *Jim Bouton Corp. v. Wm. Wrigley Jr. Co.*, 902 F.2d 1074, 1077 (2d Cir. 1990) (stating that "whereas" clauses "furnish a background in relation to which the meaning and intent of the operative provisions can be determined."); *Am. Nat'l Bank of Jacksonville v. FDIC*, 710 F.2d 1528, 1534-35 (11th Cir. 1983) (recitals may provide "definitive evidence of the intent of the parties," particularly "where there is no language in the operative portion of the contract which conflicts with the intent expressed in the recitals."); 17A Am. Jur. 2d *Contracts* § 383 (2004) ("[R]ecitals may have a material influence in construing the contract and determining the intent of the parties, and in such respect they should, so far as possible, be reconciled with the operative clauses and be given effect.").

is going to build the San Luis Unit for the purpose of providing "water to the District pursuant to the terms of this contract," the United States represents that it also "is providing an interceptor drain designed to meet the drainage requirements of the San Luis Unit." 1963 Contract at 1, 2 (APP. A157-A158). In turn, Westlands states that it "desires to contract . . . for drainage service by means of the interceptor drain for which the District will make payment to the United States upon the basis, *at the rate, and pursuant to the conditions hereinafter set forth*." *Id.* (APP. A158) (emphasis added). As discussed above, the "rate" and "conditions" are reflected in Articles 3, 6, 9 and 13 of the 1963 Contract.

Finally, it is at the very least ambiguous whether the United States is contractually obligated under the 1963 Contract to provide drainage to Westlands. A contract is ambiguous if it is susceptible to "more than one reasonable interpretation." *City of Tacoma*, 31 F.3d at 1134. Conversely, to be unambiguous as a matter of law, the contract must be susceptible of no reasonable meaning other than the reading posited. *Grumman Data Sys. Corp. v. Dalton*, 88 F.3d 990, 997 (Fed. Cir. 1996) (citing *C. Sanchez & Son, Inc.*, 6 F.3d at 1544). As shown in Section B, below, the District Court in *Westlands I* concluded that the 1963 Contract obligated the government to provide drainage service, demonstrating that this is at least "a" reasonable meaning. 134 F. Supp. 2d at 1138, 1142-1144, n.72, 1158.

The contrary conclusion by the court below should be rejected. It reasoned that although the various contractual provisions were "consistent with defendant's statutory duty to provide drainage," they could not reasonably be read to "constitute a separate contractual undertaking to provide drainage." *Westlands II*, 109 Fed. Cl. at 196 (APP. A21). That analysis is flawed. Although the San Luis Act imposes a statutory duty on the United States to provide drainage for irrigation water supplied to the San Luis Unit, that is in no way *inconsistent* with reading the 1963 Contract to require the United States to provide water and drainage service to Westlands. The San Luis Act authorizes contracts through which the United States can obligate itself to provide water and drainage service consistent with the San Luis Act. *See Firebaugh*, 10 F.3d at 669 ("To implement the [San Luis] Act, the Bureau entered into contracts with water service providers, including appellants Westlands . . . ."); 43 U.S.C. § 511 ("In carrying out the purposes of the . . . reclamation law, the Secretary of the Interior may enter into contract with any legally organized irrigation district.").

The 1963 Contract is one such contract. In Articles 3(g), 6(a), and 9(d), the United States agreed specifically to provide Westlands with reliable access to irrigation water and to provide Westlands with drainage service. *See* 1963 Contract, Art. 3(g), 6(a) (APP. A165, A168). In turn, in Articles 3(g), 6(a), and 13, Westlands promised (1) to pay for both irrigation water and access to drainage that is essential once irrigation water is introduced onto farmland, *id.,* Art. 6(a) (APP. A168), and (2) to construct

"drainage works as are necessary to protect the irrigability of lands within the District." *Id.*, Arts. 3(g), 13 (APP. A165, A178). Although these contractual provisions predictably mirror the general statutory irrigation and drainage obligations reflected in the San Luis Act, they impose independent contractual obligations that are binding as between Westlands and the United States, as authorized by the San Luis Act.

The court's contrary conclusion also fails (1) to read the 1963 Contract "as part of an organic whole" and (2) to give a "reasonable meaning" "to all of the contract terms." *Lockheed Martin*, 108 F.3d at 322. Under the court's reading, Westlands is bound to build drainage facilities to connect to an "interceptor drain," 1963 Contract, Art. 3(g) (APP. A165), but the United States has no corresponding obligation to provide Westlands with any access to drainage. *Westlands II*, 109 Fed. Cl. at 195-96 (APP. A20). Under the court's reading, Westlands is bound to pay the United States for "drainage service," but the United States has no corresponding obligation to provide such service to Westlands. 109 Fed. Cl. at 195-96 (APP. A20-21). And, under the court's reading, the United States has a contractual right to suspend (temporarily) "the service of the interceptor drain" even though such a contractual right would be superfluous if the United States had no contractual obligation to provide Westlands with drainage service in the first place. *Id.* at 196 (APP. A21) (internal quotation marks omitted).

The conclusion of the court below that the 1963 Contract imposes binding drainage obligations *only* on Westlands, but not on the United States, is not a reasonable reading of the 1963 Contract. But even if the trial court's reading were a "reasonable" one, the judgment still must be reversed. In resolving a motion to dismiss, "[t]he question before the [court] [is] not to decide the better reading of the contract." *Cf. C. Sanchez*, 6 F.3d at 1544. The conclusion that the 1963 Contract requires the United States to provide drainage to Westlands is, at a minimum, a reasonable one.

2. The 1965 Contract.

The United States' contractual drainage obligation to Westlands is likewise confirmed by the 1965 Contract.

Under the 1965 Contract, the United States expressly agreed to construct, for Westlands, "a water distribution" and "a drainage collector system" so that Westlands could benefit from the water and drainage service provided by the United States. APP. A283-A284. Article 2(a) provides that "[t]o the extent that funds may now or hereafter be available by appropriation and allocation for the purposes set forth herein, the United States will expend [them] toward construction of a distribution system" defined to include a "drainage collector system and related facilities." 1965 Contract, Art. 1(d), 2(a) (APP. A284-A285).[12] Those "facilities" "include substantially

[12] The court below suggested that the "availability of funds was a condition precedent

all of the . . . drainage collector facilities . . . as initially required to serve the area substantially as delineated on Exhibit A." 1965 Contract Art. 2(c) & Exh. A (APP. A285, A316-A323). Exhibit A, in turn, includes a map of the "Drains Feasibility Plan" for the "Westlands Water District Distribution System." 1965 Contract, Ex. A (APP. A316-A323). The map shows the interceptor drain. *Id.*

In exchange for the government's promise to construct a "drainage collector system" for Westlands, Westlands agreed to "repay to the United States" the actual cost of the "distribution system," including the "water distribution" and the "drainage collector system and related facilities." 1965 Contract, Arts. 4(a) & 4(b) (APP. A287-A289). Since 1979, Westlands has made all payments due under the 1965 Contract, even though the United States has provided no drainage service since 1986. Compl. ¶¶ 40, 53 (APP. A75, A79-A80).[13]

The court below concluded that the 1965 Contract was unrelated to any promise to provide drainage service and merely "obligated plaintiff to repay the government for actual costs of building facilities that defendant had a *statutory obligation*

---

for performance of the contemplated construction." *Westlands II*, 109 Fed. Cl. at 199 (APP. A24). Westlands, however, alleged that the United States "incorrectly determined that there were insufficient funds to pay for the construction." Compl. ¶ 54 (APP. A80). An "availability of funds" defense is refuted by the facts alleged by Westlands, and thus cannot be a basis for a motion to dismiss under Rule 12(b)(6).

[13] The 1965 Contract does not expire until forty years after Westlands began making payments in 1979. 1965 Contract, Arts. 4(a) & 4(b) (APP. A287-A289). It is therefore still in effect.

to provide." *Westlands II*, 109 Fed. Cl. at 199 (APP. A24-A25) (emphasis added). That conclusion is mistaken. The existence of a statutory obligation is in no way inconsistent with the specific contractual obligations reflected in the 1965 Contract. Indeed, the Ninth Circuit has held that "[t]o implement the [San Luis] Act, the Bureau entered into contracts with water service providers, including appellants Westlands . . . ." *Firebaugh*, 10 F.3d at 669; *see United States v. Fort Belknap Irrigation Dist.*, 197 F. Supp. 812, 818 n.5 (D. Mont. 1961) (When the government contracts with irrigation districts pursuant to federal reclamation laws, "[t]he government is bound by the provisions of the respective contracts to the same extent as the [irrigation] districts."). The 1963 and 1965 Contracts are such agreements.

Further, the "water distribution" and "drainage collector facilities" that the United States agreed to build under the 1965 Contract are directly connected to the contractual obligations of the United States set forth in the parties' 1963 Contract. The 1965 Contract expressly cites the parties' "water service contract" and obligates the United States to construct "facilities and structures for handling water after delivery thereof to the District . . . pursuant to the water service contract," 1965 Contract, Arts. 1(e), 2(a) (APP. A284-A285), and states that the contractual obligations undertaken by the United States are designed to allow Westlands to use "the water supply made available under the [1963 Contract]." *Id.* (APP. A283). It would be unreasonable to conclude that Westlands agreed to repay the United States over $150

million dollars to construct, *inter alia*, a drainage collector system if the United States had no contractual obligation to provide both water and drainage to Westlands.

Finally, the decision below must be reversed because, at a minimum, it is at least reasonable to read the 1963 Contract and 1965 Contract as imposing and reflecting a contractual obligation on the United States to provide drainage to Westlands. Even if this were not the only reasonable reading of the 1965 Contract, a final determination of which of two reasonable interpretations is the better reading should be based on "all the relevant circumstances surrounding the transaction" including "recitals to a contract," the "conduct of the parties" and "oral statements." *KMS Fusion, Inc. v. United States*, 36 Fed. Cl. 68, 77 (1996), *aff'd*, 108 F.3d 1393 (Fed. Cir. 1997) (unpublished table decision). A motion to dismiss, before discovery has been conducted, is not the proper vehicle for resolving such a dispute.

3. The Interim Renewal Contracts.

The Interim Renewal Contracts likewise carry forward the United States' obligation to provide drainage to Westlands.

In the 2007 Contract, the United States acknowledges "that adequate drainage service is required to maintain agricultural production within certain areas served with Project Water made available under this Contract." 2007 Contract, Recital 12.2 (APP. A202). Under the 2007 Contract, the "Rates and Charges applicable to [Westlands] upon execution of the Contract" include a charge of $0.24 per acre-foot of water for

the "Operation and Maintenance" of the "San Luis Drain." APP. A265. The 2007 Contract additionally provides that: "The Contracting Officer shall notify the Contractor [Westlands] in writing *when* drainage service becomes available," and, thereafter, the rate paid by Westlands would be subject to further modification "pursuant to the then-existing ratesetting policy for Irrigation Water." 2007 Contract, Art. 16(c) (APP. A235) (emphasis added).

As with the 1963 and 1965 Contracts, Westlands has continued to pay these charges but has received no drainage service under the 2007 Contract. Compl. ¶¶ 40, 53 (APP. A75; A79-A80). Like the 1963 Contract and the 1965 Contract, the 2007 Contract creates reciprocal obligations whereby Westlands has agreed to pay for drainage, and, in turn, the United States has agreed to provide such drainage to Westlands.[14]

The court below rejected that conclusion, ruling that the 2007 Contract did not carry forward any contractual obligation to provide drainage because "neither the 1963 Contract nor the 1965 Repayment Contract created a drainage obligation."

[14] The 2007 Contract was extended by another renewal contract in 2010 and further interim renewal contracts in 2012. *See* 2010 Contract, Art. 1(a) (APP. A276); 2012 Contracts (APP. A872, A877, A882, A887, A892, A897-A898). The purpose of these renewal contracts was to extend the obligations in the prior contracts by incorporating their terms while changing the expiration dates. 2010 Interim Renewal Contract ¶ 1 (APP. A275-A276); 2012 Contracts ¶ 1 (APP. A872-A873; A877-A878; A882-A883; A887-A888; A892-A893; A897-A898). As such, these subsequent renewal contracts carry forward the obligation of the United States to provide drainage.

Westlands II, 109 Fed. Cl. at 200 (APP. A26). As shown above, however, the 1963 Contract and 1965 Contract impose on the United States a contractual obligation to provide drainage to Westlands. Nothing in the 2007 Contract (or subsequent interim contracts) abrogates the United States' pre-existing contractual obligation to provide drainage service.

The court also was mistaken in concluding that the terms of the 2007 Contract did not obligate the United States to provide drainage. Specifically, the court rejected Westlands' reliance on the 2007 Contract's requirement that Westlands (1) pay "twenty-four cents for operation and maintenance of the interceptor drain," *id.* at 201 (APP. A28), and (2) allow modification of the applicable rate "*when* drainage service becomes available," 2007 Contract, Art. 16(c) (APP. A235) (emphasis added). Westlands' obligations to pay for drainage services under these provisions presuppose a reciprocal contractual obligation on the United States to provide Westlands that drainage service.

The court also stated that "any drainage obligation contained in this drainage service rate provision is expressly conditioned on drainage service becoming available" and "this condition has not been met." 109 Fed. Cl. at 201 (APP. A28). That conclusion is mistaken because Westlands has alleged that the reason drainage has not been available to Westlands is because the United States has failed in its contractual obligation to provide it, including its obligation under the covenant of

good faith and fair dealing. Compl. ¶ 147 (APP. A106) (highlighting failures by United States in satisfying its obligation to provide drainage). Further, these contract terms do not merely reflect the United States' "statutory duty to provide drainage." 109 Fed. Cl. at 202 (APP. A21). As with the 1963 Contract, the 2007 Contract (and subsequent interim renewal contracts) reflect reciprocal binding obligations between the United States and Westlands, under which the United States must provide and Westlands must pay for both water and drainage service.

B. The United States Is Precluded From Arguing That the 1963 Contract Does Not Obligate It To Provide Drainage.

As explained above, the government has a contractual obligation to provide drainage. In fact, the District Court in *Westlands I*, 134 F. Supp. 2d 1111, has already held that the 1963 Contract imposes a contractual drainage obligation on the United States. The United States should be precluded from re-litigating this issue, as it was resolved against the government in *Westlands I*.

1. Applicable Standards.

Under the doctrine of issue preclusion, "a judgment on the merits in a first suit precludes relitigation in a second suit of issues actually litigated and determined in the first suit." *In re Freeman*, 30 F.3d 1459, 1465 (Fed. Cir. 1994). Issue preclusion applies where "(1) an issue is identical to one decided in the first action; (2) the issue was actually litigated in the first action; (3) the resolution of the issue was essential to a final judgment in the first action; and (4) the party defending against issue preclusion

had a full and fair opportunity to litigate the issue in the first action." *Shell Petroleum, Inc. v. United States*, 319 F.3d 1334, 1338 (Fed. Cir. 2003). The court below erroneously held that issue preclusion does not apply here because Westlands had not satisfied the first factor, that the issue be identical in both cases.

2. The Holding in *Westlands I*.

Westlands I involved "recordable contracts" entered into pursuant to the 1963 Contract at issue in this case. The 1963 Contract provides that large landowners may purchase water at the rate set forth in the contract only if they enter into "recordable contracts" with the government, agreeing to sell their "excess lands"[15] within ten years; for those ten years, they may purchase water under the 1963 Contract rate for all of their lands. 1963 Contract, Arts. 23-26 (APP. A183-A190); *Westlands I*, 134 F. Supp. 2d at 1117, 1121.

The "terms and conditions" of the 1963 Contract are incorporated into the recordable contracts. 134 F. Supp. 2d at 1139 (quoting 1963 Contract, Art. 15); *see id.* ("Under Article 5, 'all rights of the Landowner to receive Project water for its excess land shall be subject to the provisions of the 1963 District Contract and this contract.'") (alterations omitted). In turn, Article 13 of the recordable contracts tolls the running of the ten-year period whenever the "water or service" that the

[15] Any lands in excess of 160 acres per landowner (or 320 acres for a husband and wife) were considered "excess lands." *See Barcellos & Wolfsen, Inc. v. Westlands Water Dist.*, 899 F.2d 814, 816 n.1 (9th Cir. 1990).

government is obligated to provide is not "available to the land involved through no fault of the District or the Landowner." *Id.* at 1140 (internal quotation marks omitted).

In *Westlands I*, the United States sued Westlands Water District, contending that the 1963 Contract rate for water was not available for lands within the District encumbered by recordable contracts. 134 F. Supp. 2d at 1122. Westlands interpled the landowners who were parties to those contracts. *Id.* at 1122-23. A central question in *Westlands I* was whether Article 13 of the recordable contracts tolled the ten-year period, during which owners of excess lands could receive water at the contractual rate, when the government provided water but failed to provide drainage service. The government argued that it did not, and that the lower rate for water was not available because the ten-year period had expired. *Id.* at 1124. The landowners contended, and *Westlands I* held, that the 10-year period was tolled by the government's failure to provide service, *i.e.*, drainage service under the 1963 Contract. *See id.*

This holding turned on *Westlands I*'s resolution of the same issue presented here: Whether the 1963 Contract obligates the government to provide drainage service. *Westlands I* held that "the parties agreed in the 1963 Contract to ten years of subsidized water and drainage service for excess lands under recordable contract." *Id.* at 1143 n.72. Indeed, the court held, "[t]he 1963 Contract has a singular overriding

purpose: the government supplies a specified volume of water (and drainage service) to Westlands at a subsidized price ($8.00/acre-foot) over a defined time period (40 years)." *Id.* at 1153. Based on that holding, *Westlands I* reasoned that the term "service" in the recordable contracts included "drainage service," so that the failure to provide drainage service tolled the ten-year period. *Id.* at 1158. Because this case also presents the same issue of whether the 1963 Contract imposes a contractual drainage obligation upon the government, *Westlands I* has preclusive effect here.

3. The Decision Below.

The court below held that this "issue preclusion argument fails, both because the issue in the previous litigation was not identical to the issue here and because plaintiff misstates the court's ruling in the previous litigation." *Westlands II*, 109 Fed. Cl. at 193-94 (APP. A17); *see id.* at 195 (APP. A18) (*Westlands I* "did not discuss or recognize any contractual drainage service obligation of the government to Westlands arising out of the 1963 contract."). The court further concluded that "the *Westlands I* court addressed the price of water for excess land owners, not a purported obligation under the 1963 contract to provide drainage." *Id.* at 194-95 (APP. A19). These rulings are mistaken.

Although the *Westlands I* court admittedly addressed "the price of water for excess land owners," its holding that the owners of "excess lands" were entitled to water at the lower rate depended on its determination that the 1963 Contract imposed

a contractual drainage obligation that the United States had failed to meet. Resolution of the water price issue turned on whether "the Article 13 extension period provisions from the recordable contracts apply to lack of drainage service" under the 1963 Contract.

Specifically, while the *Westlands I* court noted that "the 1963 Contract does not explicitly define 'service,'" it explained that "service" must include drainage, because "[t]he price per acre-foot of water provision in Article 6(a) of the 1963 Contract confirms that 'water or service' in Article 13 of the recordable contracts includes drainage service, because those two items were the predominant benefit of the bargain: $7.50/acre-foot for water, and $0.50/acre-foot for drainage." 134 F. Supp. 2d at 1138. Therefore, the court concluded, under these "unambiguous terms within the 1963 Contract, a failure to provide drainage service implicates the Article 13 extension provision of the recordable contracts." *Id.* Thus, *Westlands I*'s holding that "the parties agreed in the 1963 Contract to ten years of subsidized water and drainage service for excess lands under recordable contract," *id.* at 1143 n.72, covers the identical issue presented here.

Indeed, *both* parties in *Westlands I* argued that the interpretation of the recordable contracts depended on the interpretation of the 1963 Contract. The government itself contended that the landowners "must base their claims on their respective recordable contracts and, at least as to the Claimants within the Westlands

Water District, on the 1963 contract between the United States and Westlands." Opening Br. of United States in Support of Motion for Summary Judgment at 35-36, *United States v. Westlands Water Dist.*, No. 89-cv-172, Doc. No. 327 (E.D. Cal. July 3, 2000). The landowners similarly argued that the 1963 Contract, the 1965 Contract, and the recordable contracts "form a unified whole" and "must be read together to determine the rights and duties of the U.S. and [landowners] as to service charges to excess lands not receiving drainage service." Br. in Opposition to United States Motion for Summary Judgment at 9-11, *United States v. Westlands Water District*, No. 89-cv-172, Doc. No. 336 (E.D. Cal. July 17, 2000). Furthermore, the landowners argued that the recordable contracts "implement the 1963 service contract," and that "[t]he 1963 service contract obligates the U.S. to provide water and drainage service to Area I." *Id.* at 10; *see Westlands I*, 134 F. Supp. 2d at 1126 (stating that the landowners argued that "the government's failure to provide drainage service breached the 1963 Contract and their recordable contracts."); *see Westlands I*, 134 F. Supp. 2d at 1115 ("[T]he [landowners] raised many issues, including whether the term 'service' in the 1963 Contract and recordable contracts includes 'providing drainage service to recipients.'").[16]

[16] Additionally, the identical issue was necessarily decided in *Westlands I* because the court there had to determine whether the suit was precluded by *Barcellos & Wolfsen, Inc. v. Westlands Water District*, 899 F.2d 814 (9th Cir. 1990). *Barcellos* had held that recordable contract holders had no contractual right to subsidized water after the expiration of the ten-year period. 134 F. Supp. 2d at 1132. *Westlands I* held that it was

The government should not be permitted to re-litigate the issue of whether it has an obligation to provide drainage under the 1963 Contract.

C. The Complaint States A Claim for Breach of the Covenant of Good Faith and Fair Dealing.

The court below properly acknowledged that "Government contracts, like all other contracts, include an implied duty of good faith and fair dealing, which requires that each party not interfere with the other party's rights under the contract." 109 Fed. Cl. at 204 (APP. A32).[17] The court nevertheless rejected Westlands' claim for breach of this implied covenant of good faith and fair dealing because Westlands "has failed to show a contractual duty to provide drainage arising out of any of the 1963 Contract, the 1965 Repayment Contract, the 2007 Interim Contract, [or] the 2010 Interim Contract." *Id.* at 33 (APP. A34).[18]

As addressed in Sections I.A. and I.B., the premise underlying the Court's ruling is mistaken because the United States has a contractual obligation to provide

---

not precluded by *Barcellos* because "[t]he entire 1963 Contract was not interpreted by the *Barcellos* majority." *Id.* at 1134. In particular, *Westlands I* distinguished *Barcellos* as interpreting the land sale requirements, but not deciding the issue of a contractual right to drainage raised in *Westlands I*. *Id.*

[17] *See Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005) (a party may "not . . . act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract"); *accord Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 828 (Fed. Cir. 2010).

[18] *See also* 109 Fed. Cl. at 205 (APP. A34) (Westlands "has not shown that drainage service is a 'fruit' of any of the contracts"); *id.* ("Nor could any contractual drainage obligation of the government be abrogated when no such obligation existed").

drainage service and facilities under its contracts with Westlands. Further, Westlands alleged facts that set forth a compelling claim that the United States has breached the covenant of good faith and fair dealing with respect to its contractual obligation to provide drainage service and facilities to Westlands.

The government's bad faith is painstakingly described throughout the Complaint. *See* Compl. ¶¶ 4, 34, 49, 50-59, 67, 70-79, 80-89, 90-118, 120-129, 133, 139 (APP. A63, A73, A78-A81, A83-A102, A104, A105). Since 1986, the government has provided no drainage to Westlands, even though Westlands has been paying for drainage continuously since 1979. Compl. ¶¶ 4, 34, 49, 67, 133 (APP. A63, A73, A78, A83, A104). The government first unsuccessfully sought to be legally excused from its statutory obligation to provide drainage under the San Luis Act. *Id.* ¶¶ 80-87 (APP. A86-A88). It settled the *Barcellos* case with a consent decree, but then reneged on its obligation by designing a drainage plan that was patently unsatisfactory. *Id.* ¶¶ 71, 73, 74, 78 (APP. A83-A85).

The excuses cited by the government were rejected by the Ninth Circuit Court of Appeals, which stated that "'lands within Westlands are subject to injury caused by agency action unlawfully withheld.'" Compl. ¶ 89 (APP. A88 (quoting *Firebaugh*, 203 F.3d at 578)). The Ninth Circuit further explained that, after "two decades of studies," "[n]ow the time has come for the [government] . . . [t]o mee[t] its duty to provide drainage under the San Luis Act." *Id.* Ordered by the Ninth Circuit to

"promptly" provide drainage to the San Luis Unit, the government embarked on more studies, evaluations, reports, the development of alternatives, the development of new alternatives, the issuance of Draft Environmental Impact Statements, the issuance of Environmental Impact Statements, the issuance of Records of Decision, the issuance of Feasibility Reports, and the filing of Reports, Schedules, Plans and Amended Plans. Compl. ¶¶ 92-118 (APP. A89-A96).

As explained by the District Court for the Eastern District of California, "the government was given 10 years to formulate a drainage plan" but "[i]t wasn't done." Compl. ¶ 120 (APP. A97). Thereafter, "starting in about 1992 to 1993," the government prepared "annual reports and we are now in 2011, and there is no finite drainage proposal that has yet been formulated by the government." *Id.*

Finally, in September 2010, the government renounced any obligation to provide drainage to Westlands and other water districts in a letter from BOR to Senator Feinstein. Compl. ¶¶ 123-24 (APP. A100-A101). In that letter, the government abandoned its prior commitments to provide drainage, purported to transfer the obligation to provide drainage to Westlands, and threatened to suspend water delivery unless water districts such as Westlands "provide acceptable drainage service within a specified timeframe." *Id.*, Exh. A at 2 (APP. A116).

The Complaint alleges facts that, if proven at trial, would establish that the government's action have "destroy[ed] the reasonable expectations of [Westlands] regarding the fruits of the contract." *Centex*, 395 F.3d at 1304.[19]

II. WESTLANDS' CLAIMS FOR DAMAGES CAUSED BY THE GOVERNMENT'S FAILURE TO PROVIDE DRAINAGE SINCE JANUARY 6, 2006 ARE NOT TIME-BARRED.

The applicable statute of limitations, 28 U.S.C. § 2501, provides that claims must be brought within six years. Westlands brought this action on January 6, 2012. Therefore, Westlands' claims for damages caused by acts or omissions occurring after January 6, 2006, including the failure to provide drainage, are not time-barred.[20]

---

[19] In addressing this claim, the court also stated that it failed because the underlying contracts "contemplated that funds may not be available for completing the planned drainage system construction." *Westlands II*, 109 Fed. Cl. at 206 (APP. A34). That conclusion is wrong for several reasons. The government never argued that its failure to comply with its obligation of good faith and fair dealing stems from a purported inadequacy of funding. But even if it had, Westlands has alleged that the government "incorrectly determined that there were insufficient funds to pay for construction" under the 1965 Repayment Contract. Compl. ¶ 54 (APP. A80); *id.* ¶ 55 (alleging that Solicitor for the Department of Interior has acknowledged the government's "significant mistake"). More generally, Westlands has alleged that the United States "fail[ed] to devote adequate resources to the task of developing, adopting and implementing a drainage plan" and "fail[ed] to seek necessary appropriations from Congress to effect the plan." *Id.* ¶ 147 (APP. A106). These allegations must be accepted under Rule 12(b)(6). *See Sommers Oil*, 241 F.3d at 1378.

[20] As authorized under RCFC 8(d), before the Court of Federal Claims, Westlands asserted in a number of claims (*i.e.,* repudiation, total breach, and anticipatory breach theories), an alternative accrual theory under which the statute of limitations would not have run for damages incurred prior to January 6, 2006. *See* Ct. Fed. Claims R. 8(d) ("If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient"). Those alternative theories are not at issue in this appeal.

The court below properly held that alleged partial breaches of the contracts after January 6, 2006, are not barred by the statute of limitations. Specifically, the court stated that "[t]o the extent that any reports or schedules filed in connection with the *Firebaugh* litigation and any failures to act in accordance with any of these documents, the 2010 Feinstein Letter, unsuccessful repayment contract negotiations—or any other events alleged in the pleadings to have occurred after January 6, 2006—can be understood to be alleged as partial breaches, such claims would survive the statute of limitations." *Westlands II*, 109 Fed. Cl. at 212 (APP. A43) (citations omitted).

Earlier in the opinion, however, before addressing the partial breach doctrine, the court appeared to suggest that Westlands cannot seek damages based on certain "alleged injuries stemming from a lack of drainage," because "Westlands stopped receiving drainage in 1986." *Id.* at 211-12 (APP. A42). It is thus unclear whether the court intended to limit Westlands' ability to recover damages under a partial breach theory for acts or omissions (including the failure to provide drainage) that occurred on or after January 6, 2006. As explained in Section II.A below, Westlands thus requests that this Court clarify that damages arising from the government's failure to provide drainage during the six-year limitations period are not time-barred, even if the government also committed similar partial breaches outside the limitations period.

Finally, as explained in Section II.B below, Westlands requests that the Court reverse the erroneous holding that the continuing claims doctrine does not apply here. *Id.* at 213 (APP. A45).

A. The Court Below Had Jurisdiction Over Westlands' Claims Under the Partial Breach Doctrine.

The governing legal standards are well settled. "Generally, in the case of a breach of contract, a cause of action accrues" and the statute of limitations begins to run "when the breach occurs" and "the claimant has suffered damages." *Alder Terrace, Inc. v. United States*, 161 F.3d 1372, 1377 (Fed. Cir. 1998) (alterations and internal quotation marks omitted). The statute of limitations, however, does not necessarily expire six years after the first breach of a government contract. Some contracts "require continuing (or continuous) performance for some specified period of time" and "are capable of a series of 'partial' breaches." *San Carlos Irrigation & Drainage Dist. v. United States*, 23 Cl. Ct. 276, 279 (1991) (quoting 4 A. Corbin, *Corbin on Contracts* § 956, at 841 (1951)). "For each 'partial' breach a separate action is maintainable, just as in the case of an 'installment' contract." *Id.* A plaintiff may recover damages only for past partial breaches; "subsequent claims for future damages are considered to accrue for the purposes of the statute of limitations at the time such damages are incurred." *Ind. Mich. Power Co. v. United States*, 422 F.3d 1369, 1378 (Fed. Cir. 2005). The court below did not question these principles. *Westlands II*, 109 Fed. Cl. at 212 (APP. A42-A43).

Here, the government's failure to perform its contractual drainage obligation is properly viewed as a series of partial breaches of its contracts with Westlands. In *San Carlos*, the government had a contractual obligation to maintain a dam under repayment contracts very similar to those involved here. The government's failure to maintain the dam first caused damages well outside the limitations period. 23 Cl. Ct. at 279. More than six years before the plaintiff filed suit, the dam's spillway gates had become inoperable, the reservoir behind the dam had overflowed, and the plaintiff water district did not receive its allocated shares of water and electric power. *Id.* The government argued that the suit was therefore time-barred. *Id.* Rejecting this argument, the court said, in reasoning equally applicable in this case, that the government had a "*continuing* duty to operate and maintain the Joint Works," and that later spills "were each separate partial breaches of the Repayment Contract." *Id.* (emphasis in original). Therefore, "[a] cause of action arose for each partial breach, and the statute of limitations applies separately to each partial breach." *Id.*

Similarly, this Court held that the government's ongoing failures to perform its contractual obligations to take possession and dispose of spent nuclear fuel from nuclear power generation facilities constitute partial breaches of those contracts. *Bos. Edison Co. v. United States*, 658 F.3d 1361, 1366 (Fed. Cir. 2011) ("The government's ongoing breach of the Standard Contract gives rise to damages for partial breach."); *Ind. Mich. Power*, 422 F.3d at 1373-74, 1377-78 (holding that, because the government

had partially breached the contract, the plaintiff could "obtain recovery for post-breach damages as they are incurred"); *Yankee Atomic Elec. Co. v. United States*, 536 F.3d 1268, 1282 (Fed. Cir. 2008) (same); *Entergy Nuclear FitzPatrick, LLC v. United States*, 711 F.3d 1382, 1385 (Fed. Cir. 2013) ("[T]he government's failure to begin accepting [spent nuclear fuel] as of January 31, 1998 is a partial breach of the contract.").

Likewise, the government here has a continuing duty to provide drainage, and its ongoing failures to do so constitute ongoing partial breaches of its contractual obligations. New claims accrue each time Westlands suffers damages from those ongoing breaches. *Cf. Westlands II*, 109 Fed. Cl. at 212 (APP. A42-A43) (acknowledging that "[e]ach time a partial breach of contract occurs, a new claim accrues with its own statute of limitations."). Therefore, the statute of limitations does not bar Westlands' claims for damages incurred since January 6, 2006 from the failure to provide drainage. Indeed, Westlands could not have brought suit earlier to recover these damages, because a party in a partial breach action "may not recover damages for anticipated future nonperformance." *Ind. Mich. Power*, 422 F.3d at 1376 (emphasis omitted). Instead, the party must sue after the damages are incurred. *Id.* Here, Westlands could not have sued in 1986 to recover for payments made or injuries suffered between 2006 and 2012.

Under the partial breach doctrine, Westlands' claims based on the government's failure to provide drainage since January 2006 are timely.

B. The Court Had Jurisdiction Over Westlands' Claims Under The Continuing Claims Doctrine.

The court below further erred in holding that the "continuing claims" doctrine is inapplicable to this case. Under this doctrine "repeated government action (or failure to act)" that breaches a contract "result[s] in repeated causes of action," so that a party can recover for all breaches occurring within the six year limitation period of 28 U.S.C. § 2501, even though prior breaches of the contract occurring outside the limitation period may be time-barred. *Hatter v. United States*, 203 F.3d 795, 797 (Fed. Cir. 2000) (en banc), *rev'd in part on other grounds*, 532 U.S. 557 (2001). The doctrine thus "prevent[s] the defendant from escaping all liability and hence 'acquiring a right' to continue its wrongdoing, while also retaining intact the six-year statute of limitations which Congress has enacted." *Mitchell v. United States*, 10 Cl. Ct. 63, 75 *modified*, 10 Cl. Ct. 787 (1986), *decision supplemented*, 13 Cl. Ct. 474 (1987).

A case falls within the continuing claims doctrine if: "(1) the case turned on pure issues of law, or on specific issues of fact which the court was to decide for itself; (2) Congress had not interposed an administrative agency or officer charged with the duty of determining [the claim] . . . (i.e., there was no discretionary administrative decision at issue), and (3) if fact issues were involved, they were 'sharp and narrow,'" *Hatter,* 203 F.3d at 797, meaning that they do not "demand[] judicial evaluation of broad concepts . . . which involve the weighing of numerous factors and

considerations as well as the exercise of expertise and discretion," *Friedman v. United States*, 310 F.2d 381, 385 (Ct. Cl. 1962).

Westlands' breach of contract claims satisfy this standard. The case involves legal issues concerning contract interpretation, and any factual disputes are sharp and narrow—*i.e.*, is the government obligated to provide drainage to Westlands—and do not require a court to weigh numerous factors or apply specialized factual expertise. Westlands' claims therefore satisfy the first and third factors of the continuing claims doctrine, and the court below did not hold otherwise, *Westlands II*, 109 Fed. Cl. at 213 (APP. A44).

The court, however, erroneously concluded that Westlands did not meet the remaining factor, lack of a discretionary agency decision. The court stated that "plaintiff concedes that this is a case involving agency discretion," because Westlands had stated that "pursuant to *Firebaugh*, the government has discretion to determine how to provide drainage service to Westlands." *Id.* (APP. A45). But Westlands is not challenging a discretionary government decision regarding *how* to provide drainage; rather, Westlands is challenging the government's decision *not* to provide drainage at all. Indeed, the Ninth Circuit has ruled that, under the San Luis Act, "the Department of Interior has a duty to provide drainage service." 203 F.3d at 578.[21] As discussed in

[21] *Firebaugh* likewise makes clear that "the Secretary's discretion was limited to a determination of which lands within the unit need drainage service to protect their arability and how big the interceptor drain must be"; that is, "the Secretary did not

Section I, the Contracts between the United States and Westlands obligate the United States to provide drainage service and facilities to Westlands. Because Westlands is challenging the government's failure to meet this fundamental, non-discretionary obligation, this factor of the continuing claims standard is satisfied as well.

The court below also held that the continuing claims doctrine does not apply because, "unlike the periodic payment cases, this is not a case where a plaintiff has alleged a right to a series of periodic performances by defendant." *Westlands II*, 109 Fed. Cl. at 214 (APP. A45). But while a number of continuing claims cases involve a right to periodic payments, *see, e.g., Hatter*, 203 F.3d at 797, the doctrine also covers cases where the government is involved in an "ongoing breach" of "a continuing duty." *Oenga v. United States*, 91 Fed. Cl. 629, 646 (2010) (applying doctrine to duty to monitor leases); *see also Mitchell*, 10 Cl. Ct. at 77 (applying doctrine to duty to manage forest lands); *Cherokee Nation of Okla. v. United States*, 26 Cl. Ct. 798, 803 (1992) (applying doctrine to duty to protect against trespass).

The continuing claims doctrine applies here, and Westlands' claims for damages incurred since January 6, 2006 are not time-barred.

---

have unlimited discretion to determine whether the construction of a drain was necessary at all." 203 F.3d at 574.

CONCLUSION

For the reasons elaborated above, the judgment below should be reversed with respect to Westlands' claims for breach of express contractual obligations and breach of the covenant of good faith and fair dealing. Further, Westlands should be permitted to prove these claims under the partial breach and continuing claims doctrines for the period beginning on, or after, January 6, 2006.

Dated this 13th day of June, 2013.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

Lawrence W. Treece
Mark J. Mathews
Brownstein Hyatt Farber Schreck, LLP
410 17th Street
Suite 2200
Denver, Colorado 80202
Tele: 303.223.1100
Fax: 303.223.8057
Email: ltreece@bhfs.com
mmathews@bhfs.com

SIDLEY AUSTIN LLP

/s/ Peter D. Keisler
Peter D. Keisler
Roger R. Martella, Jr.
Paul J. Zidlicky
Erika L. Myers
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
Phone: (202) 736-8000
Fax: (202) 736-8711
Email: pkeisler@sidley.com
rmartella@sidley.com
pzidlicky@sidley.com
erika.myers@sidley.com

ADDENDUM

In the United States Court of Federal Claims

No. 12-12 C

WESTLANDS WATER DISTRICT,

JUDGMENT

v.

THE UNITED STATES

Pursuant to the court's Opinion and Order, filed January 15, 2013,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed.

Hazel C. Keahey
Clerk of Court

January 15, 2013 By: s/Lisa L. Reyes

Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $455.00.

In the United States Court of Federal Claims

No. 12-12 C

(E-Filed: January 15, 2013)

WESTLANDS WATER DISTRICT, Plaintiff, v. THE UNITED STATES, Defendant.	Breach of Contract Claims; Declaratory Judgment; Motion to Dismiss Under RCFC 12(b)(1) and 12(b)(6)

Lawrence W. Treece, Denver, CO, for plaintiff. Mark J. Mathews and Lauren E. Schmidt, Denver, CO, and David L. Bernhardt, Washington, DC, of counsel.

Katy M. Bartelma, Trial Attorney, with whom were Stuart F. Delery, Acting Assistant Attorney General, Jeanne E. Davidson, Director, and Bryant G. Snee, Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant. Shelly Randel and Amy Aufdemberge, Office of the Solicitor, United States Department of the Interior, Washington, DC, of counsel.

OPINION AND ORDER

HEWITT, Chief Judge

Westlands Water District (plaintiff or Westlands), a water district in the state of California, buys and distributes water from the San Luis unit of the Central Valley project, which is administered by the Bureau of Reclamation of the Department of the Interior (Interior). Compl., Docket Number (Dkt. No.) 1, ¶¶ 2, 5, 12. Westlands brings this action alleging various breaches of a purported contractual obligation of the United States government (defendant or the government) to provide drainage to Westlands, based on the government's failure to provide water drainage facilities and services. See id. ¶¶ 5-7.

Specifically, plaintiff states six claims for relief. The first two claims present alternative breach of contract theories: (1) past breaches of express contractual drainage obligations, Compl. ¶¶ 131-36; or, in the alternative, (2) past breaches of implied contractual drainage obligations, id. ¶¶ 137-42. The third, fourth and fifth claims are dependent on the court's finding a contractual duty to provide drainage: (3) past breaches of implied contractual obligations of good faith and fair dealing, id. ¶¶ 143-50; (4) total breach of contract regarding drainage obligations, id. ¶¶ 151-56; and (5) anticipatory breach of contract regarding drainage obligations, id. ¶¶ 157-63. Finally, plaintiff states an alternate claim for relief, should the court find neither a total nor anticipatory breach of contract, as alleged in claims four and five, respectively: (6) declaratory judgment adjusting any amounts due by Westlands pursuant to present and future repayment contracts so that Westlands will not have to repay the government higher actual costs of construction under those contracts, as a result of inflation, than it would have had to pay if construction had not been delayed. Id. ¶¶ 164-76. In connection with (and as a condition of) its claims for total breach and anticipatory breach, plaintiff also seeks a declaration of the severability of defendant's contractual obligation to provide water service from defendant's purported contractual obligation to provide drainage. Id. ¶¶ 156, 163; Corrected Response to Motion to Dismiss (plaintiff's Response or Pl.'s Resp.), Dkt. No. 29, at 46.

Now before the court, in addition to plaintiff's Complaint, are: Defendant's Motion to Dismiss, (defendant's Motion or Def.'s Mot.), Dkt. No. 12, filed May 21, 2012, and Appendix to Defendant's Motion to Dismiss (defendant's Appendix or Def.'s App.), Dkt. Nos. 12-1,-2; plaintiff's Response to Motion to Dismiss, Dkt. No. 18, filed August 20, 2012, which was superseded by plaintiff's Response, filed September 26, 2012; and Defendant's Reply in Support of Our Motion to Dismiss (defendant's Reply or Def.'s Reply), Dkt. No. 32, filed October 12, 2012. Plaintiff also filed an Appendix in Support of Response to Motion to Dismiss, Dkt. Nos. 18-1 to 18-4, filed Aug. 20, 2012, which was superseded by plaintiff's Appendix in Support of Corrected Response to Motion to Dismiss (plaintiff's Appendix or Pl.'s App.), Dkt. Nos. 29-1 to 29-7, filed September 26, 2012.

Defendant argues that all six of plaintiff's claims must be dismissed pursuant to Rule 12 of the Rules of the United States Court of Federal Claims (RCFC), asserting that, under RCFC 12(b)(1), this court lacks jurisdiction over all of plaintiff's claims except claim five (anticipatory breach) and that, under RCFC 12(b)(6), plaintiff has failed to state a claim upon which relief can be granted with respect to all six claims. Def.'s Mot. 1.

For the reasons set forth below, defendant's Motion is GRANTED.

I. Background[1]

A. Creation of the San Luis Unit as Part of the Federal Reclamation Program

1. Relevant Federal Reclamation Laws[2]

In 1902, Congress created a "'reclamation fund'" in the Treasury--to be funded by public land sales--for "the construction and maintenance of irrigation works" to reclaim arid and semiarid lands in the western United States for productive use. Reclamation Act of 1902 (1902 Act), ch. 1093, § 1, 32 Stat. 388 (codified as amended in scattered sections of 43 U.S.C.). The Secretary of the Interior (the Secretary) received authority to contract for construction of such irrigation projects and to pay for them out of the newly created reclamation fund. Id. § 4, 32 Stat. at 389. However, these expenditures were meant to be reimbursed: pursuant to the 1902 Act, equitably apportioned charges would be levied upon irrigated lands "with a view of returning to the reclamation fund the estimated cost of construction of the project." Id. After a "major portion" of the construction costs were paid, "management and operation of [the] irrigation works" would then "pass to the owners of the [irrigated] lands." Id. § 6, 32 Stat. at 389. "[T]itle to and the management and operation of the reservoirs . . . [would] remain in the Government until otherwise provided by Congress." Id., 32 Stat. at 389.

Congress supplemented the 1902 Act with the Reclamation Project Act of 1939 (1939 Act), ch. 418, 53 Stat. 1187 (codified as amended at 43 U.S.C. §§ 485-485k (2006)), "to provide a feasible and comprehensive plan for the variable payment of construction charges on United States reclamation projects," id. § 1, 53 Stat. at 1187. Specifically, the 1939 Act described two different contract schemes: repayment contracts and water service contracts. Id. § 9(d)-(e), 53 Stat. at 1195-96 (codified as amended at 43 U.S.C. § 485h(d)-(e)). Generally, organizations contracting for water would be required to enter a repayment contract with the United States before any water could "be delivered for irrigation of lands in connection with any new project." Id. § 9(d), 53 Stat. at 1195. These repayment contracts would treat actual construction costs allocated to irrigation as "a general repayment obligation" to the United States. Id. § 9(d)(3), 53 Stat. at 1195. Repayment would "be spread in annual installments, of the number and amounts fixed by the Secretary, over a period not exceeding forty years." Id. "[T]he first annual

[1] A table of contents appears at the end of this Opinion as Exhibit A.

[2] In describing the history of federal reclamation laws, the court cites to the applicable session laws. However, in analyzing plaintiff's claims under current federal reclamation laws, the court cites to the relevant provisions as amended and codified in the United States Code. The history of the federal reclamation program is also addressed briefly in Defendant's Motion to Dismiss (defendant's Motion or Def.'s Mot.), Docket Number (Dkt. No.) 12, at 2-3.

installment for any project contract unit" would accrue "on the date fixed by the Secretary, [either] in the year after the last year of the development period," or if there was no development period, "in the calendar year after the Secretary announce[d] that the construction contemplated in the repayment contract is substantially completed or . . . advanced to a point where delivery of water can be made to substantially all of the lands" in the contract unit. Id. § 9(d)(4), 53 Stat. at 1196.

In addition, the Secretary had discretion under the 1939 Act to enter water service "contracts to furnish water for irrigation purposes" for up to a forty-year period, "at such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper." Id. § 9(e), 53 Stat. at 1196. Under a water service contract, payments would be due in advance of water delivery. Id. "[T]he costs of any irrigation water distribution works constructed by the United States in connection with the new project" would be covered by a separate repayment contract. Id.

2. Construction of the San Luis Unit

Congress authorized the Secretary to construct the San Luis unit of the Central Valley project by passing the San Luis Act of 1960 (San Luis Act), Pub. L. No. 86-488, 74 Stat. 156; see Compl. ¶ 18. The San Luis unit was created with the "principal purpose of furnishing water for the irrigation of approximately five hundred thousand acres of land in Merced, Fresno, and Kings Counties, California." San Luis Act § 1(a), 74 Stat. at 156. As "an integral part of the Central Valley project," it would be subject to federal reclamation laws with respect to its construction, operation and maintenance. Id.

Under the terms of the San Luis Act, one condition precedent to construction of the San Luis unit was that the Secretary must have made adequate drainage provisions for the unit, either by securing a commitment from the State of California to provide for a master drainage outlet or by providing for construction of an interceptor drain by the federal government. See id. (stating that construction shall not commence until the Secretary has "received satisfactory assurance from the State of California that it will make provision for a master drainage outlet and disposal channel for the San Joaquin Valley, . . . which will adequately serve, by connection therewith, the drainage system for the San Luis unit or has made provision for constructing the San Luis interceptor drain to the delta designed to meet the drainage requirements of the San Luis unit"); Compl. ¶ 18. Initially, the State of California planned to collaborate with the federal government on a master drainage outlet to serve "the drainage needs of the San Luis Unit and other surrounding areas." Compl. ¶ 51. However, when the State of California later notified Interior that it would not construct a master drainage outlet, Interior agreed to construct an interceptor drain. Id. ¶¶ 19, 51; Def.'s Mot. 7.

Westlands began receiving water from the San Luis unit in late 1967. Compl. ¶ 20; Def.'s Mot. 5.

Construction of an interceptor drain began in 1968. Def.'s Mot. 7; see Compl. ¶ 51. The purpose of the interceptor drain was to receive drainage from local drainage systems, which it would then empty into the Sacramento/San Joaquin River Delta. Compl. ¶ 50; Def.'s Mot. 7. By 1975, less than half of the planned length of the interceptor drain had been completed, with the drain ending at the Kesterson Reservoir, about sixty miles north of Westlands. Compl. ¶ 51; Def.'s Mot. 7. The interceptor drain was never extended as planned; Interior suspended construction in 1975 owing to environmental concerns. Compl. ¶ 51; Def.'s Mot. 7.

Around that time, Interior began construction of a subsurface drainage system for Westlands, which was connected to the completed portion of the interceptor drain. Def.'s Mot. 7; see Compl. ¶ 52. Beginning in 1979 and continuing through 1985, this drainage system transported drainage from Westlands to the Kesterson Reservoir. Compl. ¶ 58; Def.'s Mot. 7. However, environmental concerns arose after high levels of selenium (a mineral contained in the drainage water) were found in ducks and embryonic deformities were found in shore birds at the Kesterson Reservoir. Compl. ¶¶ 60-61; see Def.'s Mot. 7. As a result, Westlands and Interior signed an agreement in 1985 to discontinue the flow of drainage water to the Kesterson Reservoir, and the Kesterson Reservoir and completed portion of the interceptor drain were closed. Compl. ¶¶ 64-65; Def.'s Mot. 7-8. The government has not provided for drainage from the Westlands water district "since the spring of 1986[,] when Westlands' drainage collector drains were plugged." Compl. ¶ 67.

Westlands continues to receive water pursuant to water service contracts with the government. See Def.'s Mot. 8 ("Westlands continues to receive [Central Valley Project] water."); Pl.'s App. 9-39 (2012 interim renewal contracts) (providing for water service into 2014).

B. Contracts at Issue Between Westlands and the United States Government[3]

[3] The United States (defendant or the government) points out that Westlands Water District (plaintiff or Westlands) does not allege a breach of the 1985 agreement between plaintiff and defendant, see Def.'s Mot. 15 n.5, in which the parties agreed to discontinue the flow of drainage water to the Kesterson Reservoir, Compl. ¶ 65. The court agrees and does not consider whether the government breached any obligations under the 1985 agreement. Cf. Corrected Resp. to Mot. to Dismiss (plaintiff's Response or Pl.'s Resp.), Dkt. No. 29, at 1 n.1 (listing contracts "involved in this litigation" and not including the 1985 agreement in the list).

In addition, plaintiff appears to raise for the first time in its Response an allegation that the government has also breached obligations under a series of 2012 interim renewal contracts.

1. 1963 Water Service Contract

In 1963, Westlands signed a water service contract with Interior, pursuant to federal reclamation laws. Compl. ¶¶ 29-30; Def.'s Mot. 5; see Def.'s App. A2-43 (Contract Between the United States and Westlands Water District Providing for Water Service (1963 Contract)).[4] As a water service contract, the 1963 Contract is governed by 43 U.S.C. § 485h(e), where section 9(e) of the 1939 Act has been codified. See Def.'s Mot. 3, 5. Accordingly, rates under the 1963 Contract reflected the Secretary's judgment that such rates "will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper." 1939 Act § 9(e), 53 Stat. at 1196 (codified as amended at 43 U.S.C. § 485h(e)).

The 1963 Contract provided that "the United States [would] furnish to [Westlands] and [Westlands] each . . . year [would] accept and pay . . . for water from the

---

See Pl.'s Resp. 16 (mentioning "an array of interim renewal contracts in 2012" and stating that these contracts "incorporated the terms of the 'Existing Interim Renewal Contract'" and did not purport "to abrogate the obligation to provide drainage"); id. at 1 n.1 (listing the 2012 interim contracts as contracts involved in the litigation); see also App. in Supp. of Corrected Resp. to Mot. to Dismiss (plaintiff's Appendix or Pl.'s App.), Dkt. Nos. 29-1 to 29-7, at 9-39 (2012 interim renewal contracts). Plaintiff made no mention of the 2012 interim contracts in its Complaint, see Compl., Dkt. No. 1, ¶¶ 41-47 (discussing interim renewal contracts for 2007 and 2010 only), and plaintiff's attempt to extend its claims beyond the scope of its Complaint is improper, see Rules of the United States Court of Federal Claims (RCFC) 15(a) (governing amendments to the pleadings and stating that, when (as here) an amendment is not allowed as a matter of course, "a party may amend its pleading only with the opposing party's written consent or the court's leave"); see also Def.'s Reply in Supp. of Our Mot. to Dismiss (Def.'s Reply), Dkt. No. 32, at 13 n.9 (stating that plaintiff's attempt to expand the scope of the pleadings is improper). If plaintiff seeks to include the 2012 interim renewal contracts in its Complaint, it must amend its Complaint pursuant to Rule 15 of the RCFC. Cf. RCFC 15(a). Because plaintiff has not done so, the court does not consider whether defendant has breached any obligations arising out of the 2012 interim renewals contracts. Nonetheless, as defendant notes, see Def.'s Reply 13 n.9, because the 2012 interim renewal contracts incorporate the terms of the previous interim renewal contracts, see Pl.'s Resp. 16, the analysis with respect to such a claim would likely be the same as for the interim renewal contracts for 2007 and 2010, see infra Parts III.A.1.a.iii-iv (analyzing 2007 and 2010 interim renewal contracts).

[4] The Contract Between the United States and Westlands Water District Providing for Water Service (1963 Contract) is also reprinted in plaintiff's Appendix as Exhibit A to the Judgment in Barcellos & Wolfsen, Inc. v. Westlands Water District, Nos. CV 79-106-EDP & CV F-81-245-EDP (E.D. Cal. Dec. 30, 1986) (Barcellos Judgment). See Pl.'s App. 223-65 (1963 Contract).

San Luis Unit." Def.'s App. A9 (1963 Contract). In the contract, the Secretary set a rate of payment for operation, maintenance and other fixed charges not to exceed eight dollars per acre-foot[5] of water, including a drainage service component not to exceed fifty cents per acre-foot of water. Id. at A15. Further, the 1963 Contract obligated Westlands to "construct such drainage works as are necessary to protect the irrigability of lands within [Westlands water district]." Id. at A25. These local drainage facilities of Westlands were permitted to "be connected to the interceptor drain in such capacity and at such locations as may be mutually agreed upon between [Westlands] and the United States." Id. at A12.

The 1963 Contract was effective from 1967, when Westlands began receiving water from the San Luis unit, until December 31, 2007. Compl. ¶¶ 20, 33; Def.'s Mot. 5; see Def.'s App. A7-8 (1963 Contract) (defining "initial delivery date" and stating that the contract was to "remain in effect for a period of forty (40) years commencing with the year in which the earliest initial delivery date of the long-term contracts for water service from the San Luis Unit shall occur").

2. 1965 Repayment Contract

As required by federal reclamation laws, the parties entered into a repayment contract, see Def.'s App. A127-70 (Contract Between the United States and Westlands Water District Providing for the Construction of a Water Distribution and Drainage Collector System (1965 Repayment Contract)),[6] for "the construction of a water distribution and drainage collector system," id. at A127, A129 (capitalization omitted); see Compl. ¶¶ 29, 37; Def.'s Mot. 6. As a repayment contract, the 1965 Repayment Contract is governed by 43 U.S.C. § 485h(d), where section 9(d) of the 1939 Act has been codified. See Def.'s Mot. 6. A separate repayment contract was necessary--in addition to a water service contract, which covered costs of operation and maintenance--because under the 1939 Act, "the costs of any irrigation water distribution works constructed by the United States in connection with [a] new project [covered by a water service contract]" were to be covered by a separate repayment contract. 1939 Act § 9(e),

[5] An acre-foot is "[a] volume measurement in irrigation, equal to the amount of water that will cover one acre of land in one foot of water (325,850 gallons)." Black's Law Dictionary (9th ed. 2009); Def.'s Mot. 4 n.3.

[6] The Contract Between the United States and Westlands Water District Providing for the Construction of a Water Distribution and Drainage Collector System (1965 Repayment Contract) is also reprinted in plaintiff's Appendix as Exhibit B to the Barcellos Judgment. See Pl.'s App. 279-316 (1965 Repayment Contract). The maps that have been omitted from Exhibit B to the Barcellos Judgment, see id. at 316, appear in defendant's version of the 1965 Repayment Contract, see App. to Def.'s Mot. to Dismiss (Def.'s App.), Dkt. Nos. 12-1,-2, at A163-70 (1965 Repayment Contract).

53 Stat. at 1196 (codified as amended at 43 U.S.C. § 485h(e)). Accordingly, the 1965 Repayment Contract provided for repayment by Westlands of the actual construction costs of the San Luis unit, see Def.'s App. A134 (1965 Repayment Contract), whereas the 1963 Contract provided for annual payment of estimated operation and maintenance costs and other fixed charges, see supra Part. I.B.1.

Specifically, the 1965 Repayment Contract provided that "[t]o the extent that funds [were then] or [t]hereafter [would] be available . . . , the United States [would] expend toward construction of a distribution system" up to $157,048,000. Def.'s App. A131 (1965 Repayment Contract). Westlands, in turn, agreed to "repay to the United States the actual cost of the distribution system constructed and acquired pursuant to [the 1965 Repayment Contract]," up to $157,048,000. Id. at A134-35. "The actual construction cost of the distribution system to be repaid to the United States by [Westlands] . . . embrace[d] all expenditures by the United States," which included "the cost of labor, material, equipment, engineering and legal work, superindence, administration and overhead, rights-of-way, property, . . . damage of all kinds, and . . . all sums expended by the Bureau of Reclamation in surveys and investigations in connection with the distribution system." Id. at A146. The contracting officer's "determination of what costs [were] properly chargeable" under the contract, and in what amounts, was to be conclusive. Id. The government and Westlands were required to "exert their best efforts to expedite the completion" of the distribution system. Id. at A132.

The 1965 Repayment Contract provided that the distribution system facilities would be constructed in three construction phases. Id. at A132-33; see Compl. ¶ 39. As required by federal reclamation law, see 1939 Act § 9(d)(3)-(4), 53 Stat. at 1195-96 (codified as amended at 43 U.S.C. § 485h(d)(3)-(4)), the actual construction costs for each phase would be paid by Westlands over a forty-year period, interest-free, beginning in the year following completion of the phase, see Def.'s App. A135 (1965 Repayment Contract); Compl. ¶ 37; Def.'s Mot. 6. Westlands began making payments pursuant to the 1965 Repayment Contract in or about 1979, Compl. ¶ 40; see id. ¶ 53, when the first phase of the subsurface drainage system connecting Westlands to the interceptor drain was completed, see id. ¶ 52. The other phases of construction were not completed after the government determined in or about 1978--incorrectly, according to plaintiff--that funds were insufficient. Id. ¶¶ 54-55. The 1965 Repayment Contract remains in force. See Def.'s App. A135-36 (1965 Repayment Contract) (describing forty-year term for payments); Pl.'s Resp. 14 ("The 1965 [Repayment] Contract does not expire until forty years after Westlands began making payments in 1979.").

3. 2007 Interim Water Service Contract

In 2007, the parties signed an interim water service renewal contract.[7] Compl. ¶¶ 29, 41; Def.'s Mot. 6; see Def.'s App. A44-120 (Interim Renewal Contract Between the United States and Westlands Water District Providing for Project Water Service San Luis Unit and Delta Division (2007 Interim Contract)). The 2007 Interim Contract provided that "the Contracting Officer [would] make available for delivery to [Westlands] 1,150,000 acre-feet of [Central Valley] Project Water for irrigation and [municipal and industrial] purposes" during each year of the 2007 Interim Contract. Def.'s App. A58 (2007 Interim Contract). Water delivered pursuant to the 2007 Interim Contract was to be paid for in accordance with the Secretary of the Interior's 1988 ratesetting policy for irrigation water and then-existing ratesetting policy for municipal and industrial water. Id. at A69; see id. at A112 (2007 Interim Contract Ex. B (2007 rates and charges)).

With respect to drainage, the 2007 Interim Contract provided that "[t]he Contracting Officer [would] notify [Westlands] in writing when drainage service [became] available," and that "the Contracting Officer [would thereafter] provide drainage service to [Westlands] at rates established pursuant to the then-existing ratesetting policy for Irrigation Water." Id. at A82 (2007 Interim Contract); see id. at A112 (2007 Interim Contract Ex. B (2007 rates and charges)).

The 2007 Interim Contract was effective from January 1, 2008 to February 28, 2010. Id. at A56 (2007 Interim Contract); Compl. ¶ 41; Def.'s Mot. 6.

4. 2010 Interim Water Service Contract

In 2010, the parties signed a second interim water service renewal contract. Compl. ¶ 45; Def.'s Mot. 6; see Def.'s App. A121-26 (Interim Renewal Contract Between the United States and Westlands Water District Providing for Project Water Service (2010 Interim Contract)). The 2010 Interim Contract incorporated the terms and conditions of the 2007 Interim Contract. See Def.'s App. A122 (2010 Interim Contract); Compl. ¶ 46; Def.'s Mot. 6. It was effective from March 1, 2010 through February 29, 2012 and contained provisions for renewal if "a long-term renewal contract has not been executed with an effective commencement date of March 1, 2012." Def.'s App. A123 2010 Interim Contract).

II. Legal Standards

[7] Although the 1963 Contract contemplated a long-term extension, see Def.'s App. A8 (1963 Contract), no long-term extension was entered into because certain environmental requirements imposed by the Central Valley Project Improvement Act, Pub. L. No. 102-575, § 3404(c)(1), 106 Stat. 4600, 4708-09 (1992), were not met, see Compl. ¶¶ 41, 45; Def.'s Mot 6 n.4.

A. Jurisdiction

Subject matter jurisdiction is a threshold matter that a court must determine at the outset of a case. See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998); PODS, Inc. v. Porta Stor, Inc., 484 F.3d 1359, 1365 (Fed. Cir. 2007). Pursuant to the Tucker Act, the United States Court of Federal Claims (Court of Federal Claims) has jurisdiction over "any claim against the United States founded . . . upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States." 28 U.S.C. § 1491(a)(1) (2006). The Tucker Act serves as a waiver of sovereign immunity and a jurisdictional grant, but it does not create a substantive cause of action. Jan's Helicopter Serv., Inc. v. Fed. Aviation Admin., 525 F.3d 1299, 1306 (Fed. Cir. 2008). A plaintiff must, therefore, "'identify a separate source of substantive law that creates the right to money damages.'" Id. (quoting Fisher v. United States, 402 F.3d 1167, 1172 (Fed. Cir. 2005) (en banc in relevant part)).

The court's six-year statute of limitations, a condition on the Tucker Act's waiver of sovereign immunity, further limits the court's jurisdiction. See Martinez v. United States, 333 F.3d 1295, 1316 (Fed. Cir. 2003) (en banc) ("It is well established that statutes of limitations for causes of action against the United States, being conditions on the waiver of sovereign immunity, are jurisdictional in nature."); see also Soriano v. United States, 352 U.S. 270, 276 (1957) (stating that the United States Supreme Court "has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed"). Because the statute of limitations in this court is jurisdictional, Martinez, 333 F.3d at 1316, it cannot be waived, see John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 134-35 (2008) (noting the "absolute nature" of "jurisdictional" limitations statute for this court).

The statute of limitations provides that claims over which the Court of Federal Claims would otherwise have jurisdiction "shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501 (2006). A breach of contract claim first accrues when a plaintiff has fully performed its obligations under the contract--entitling the plaintiff to performance by the defendant--but the defendant has failed to perform. See Oceanic Steamship Co. v. United States, 165 Ct. Cl. 217, 225 (1964) (per curiam) (reprinting opinion and recommendation of trial commissioner, adopted as supplemented) ("[W]here a claim is based upon a contractual obligation of the Government to pay money, the claim first accrues on the date when the payment becomes due and is wrongfully withheld in breach of the contract."); accord Kinsey v. United States, 852 F.2d 556, 557 (Fed. Cir. 1988); see also Brighton Vill. Assocs. v. United States, 52 F.3d 1056, 1060 (Fed. Cir. 1995) (stating that "[a] claim accrues when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action" (internal quotation marks omitted)). However, the continuing claim doctrine "permits separate causes of action to accrue each time a plaintiff suffers damage

which is the 'result of [a] new and independent breach[] by the government.'" Banks v. United States, 88 Fed. Cl. 665, 679 (2009) (alterations in original) (quoting Boling v. United States, 220 F.3d 1365, 1374 (Fed. Cir. 2000)).

In considering a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the RCFC, as with a motion to dismiss pursuant to Rule 12(b)(6), the court must accept as true all undisputed allegations of fact made by the non-moving party and draw all reasonable inferences from those facts in the non-moving party's favor. See Trusted Integration, Inc. v. United States, 659 F.3d 1159, 1163 (Fed. Cir. 2011) (citing Henke v. United States, 60 F.3d 795, 797 (Fed. Cir. 1995)). However, "[w]hen a party challenges the jurisdictional facts alleged in the complaint, the court may consider relevant evidence outside the pleadings to resolve the factual dispute." Arakaki v. United States, 62 Fed. Cl. 244, 247 (2004) (citing Reynolds v. Army & Air Force Exch. Serv., 846 F.2d 746, 747 (Fed. Cir. 1988) & Indium Corp. of Am. v. Semi-Alloys, Inc., 781 F.2d 879, 884 (Fed. Cir. 1985)). If the court determines that it does not have jurisdiction, it must dismiss the claim. See RCFC 12(h)(3). The burden is on the plaintiff to show jurisdiction by a preponderance of the evidence. Taylor v. United States, 303 F.3d 1357, 1359 (Fed. Cir. 2002).

B. Failure to State a Claim

A motion to dismiss pursuant to RCFC 12(b)(6)[8] asserts a "failure to state a claim upon which relief can be granted." RCFC 12(b)(6). To survive a Rule 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal (Iqbal), 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly (Twombly), 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (citing Twombly, 550 U.S. at 556). This means that the complaint must "raise a right of relief above the speculative level." See Twombly, 550 U.S. at 555.

When ruling on a Rule 12(b)(6) motion to dismiss, the court "must accept as true all the factual allegations in the complaint." Sommers Oil Co. v. United States (Sommers Oil), 241 F.3d 1375, 1378 (Fed.Cir. 2001). Further, "in addition to the complaint . . . and exhibits thereto, the court 'must consider . . . documents incorporated into the complaint

[8] The RCFC generally mirror the Federal Rules of Civil Procedure (FRCP). See C. Sanchez & Son, Inc. v. United States, 6 F.3d 1539, 1541 n.2 (Fed. Cir. 1993) (stating that "[t]he [RCFC] . . . generally follow the [FRCP]"); RCFC 2002 Rules Committee Note ("[I]nterpretation of the court's rules will be guided by case law and the Advisory Committee Notes that accompany the Federal Rules of Civil Procedure."). Rule 12 of the RCFC is substantially identical to Rule 12 of the FRCP. Compare RCFC 12, with FRCP 12. Therefore, the court relies on cases interpreting FRCP 12 as well as those interpreting RCFC 12.

by reference, and matters of which a court may take judicial notice.'" Bell/Heery v. United States, 106 Fed. Cl. 300, 307 (2012) (second alteration in original) (quoting Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007)). Based on this information, the court must make "all reasonable inferences in favor of the non-movant." Sommers Oil, 241 F.3d at 1378. Nonetheless, "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Iqbal, 556 U.S. at 678. Further, the court is "not bound to accept as true a legal conclusion couched as a factual allegation." Papasan v. Allain, 478 U.S. 265, 286 (1986); see Twombly, 550 U.S. at 555.

C. Interpretation of Contract Terms

Contracts to which the government is a party are subject to general rules of contract interpretation. Lockheed Martin IR Imaging Sys., Inc. v. West, 108 F.3d 319, 322 (Fed. Cir. 1997). Pursuant to these rules, "[c]ontract interpretation begins with the language of the written agreement." Coast Fed. Bank, FSB v. United States, 323 F.3d 1035, 1038 (Fed. Cir. 2003) (citing Foley Co. v. United States, 11 F.3d 1032, 1034 (Fed. Cir. 1993)). Contract provisions that are "clear and unambiguous . . . must be given their plain and ordinary meaning." McAbee Constr., Inc. v. United States (McAbee), 97 F.3d 1431, 1435 (Fed. Cir. 1996) (internal quotation marks omitted); accord Barsebäck Kraft AB v. United States, 121 F.3d 1475, 1479 (Fed. Cir. 1997). "A contract is unambiguous when it is reasonably open to only one interpretation." Pacificorp Capital, Inc. v. United States (Pacificorp), 25 Cl. Ct. 707, 716 (1992), aff'd, 988 F.2d 130 (Fed. Cir. 1993) (unpublished table decision).

Only when a contract contains vague and ambiguous language may the court look to factors outside the contractual terms--including explanatory recitals to the contract (also called "whereas clauses"), oral statements, writings, prior negotiations and other conduct by which the parties manifested assent--to determine the parties' intent. KMS Fusion, Inc. v. United States (KMS Fusion), 36 Fed. Cl. 68, 77 (1996), aff'd 108 F.3d 1393 (Fed. Cir. 1997) (unpublished table decision). Contract language is ambiguous if it is "susceptible to more than one reasonable interpretation." McAbee, 97 F.3d at 1434-35. "It is not enough that the parties differ in their interpretation of the contract clause." Dart Advantage Warehous., Inc. v. United States, 52 Fed. Cl. 694, 700 (2002) (citing Cmty. Heating & Plumbing Co. v. Kelso, 987 F.2d 1575, 1578 (Fed. Cir. 1993)). Instead, to be ambiguous, a contract must "sustain[] the interpretations advanced by both parties to the suit." Pacificorp, 25 Cl. Ct. at 716.

Of particular relevance to this case, the canons of interpretation of government contracts provide that a government representation does not constitute a binding contractual obligation unless it is "'stated in the form of an undertaking, not as a mere prediction or statement of opinion or intention.'" Chattler v. United States, 632 F.3d

1324, 1330 (Fed. Cir. 2011) (quoting Cutler-Hammer, Inc. v. United States, 194 Ct. Cl. 788, 794, 441 F.2d 1179, 1182 (1971)); Nat'l By-Prods., Inc. v. United States, 186 Ct. Cl. 546, 560, 405 F.2d 1256, 1264 (1969). Moreover, statutory provisions generally will not be "incorporated into a contract with the government unless the contract explicitly provides for their incorporation." St. Christopher Assocs., L.P. v. United States (St. Christopher), 511 F.3d 1376, 1384 (Fed. Cir. 2008); see Smithson v. United States, 847 F.2d 791, 794 (Fed. Cir. 1988) (finding that a contract "subject" to present and future regulations did not incorporate such regulations into the contract and stating that "only the plainest language" could impose such a contractual liability on the government (internal quotation marks omitted)).

D. Issue Preclusion

The doctrine of issue preclusion prevents a party from relitigating an issue when that party has litigated the same issue on the merits and lost. Masco Corp. v. United States, 303 F.3d 1316, 1329 (Fed. Cir. 2002); In re Freeman (Freeman), 30 F.3d 1459, 1465 (Fed. Cir. 1994). Issue preclusion requires that: (1) the issue be identical to the issue in the first action; (2) the issue was actually litigated in the first action; (3) resolution of the issue was essential to a final judgment in the first action; and (4) the party precluded had a full and fair opportunity to litigate the issue in the first action. Freeman, 30 F.3d at 1465; accord Masco Corp., 303 F.3d at 1329.

E. Declaratory Judgment

As a court of limited jurisdiction, the Court of Federal Claims cannot issue declaratory judgments without express statutory authorization. See United States v. Testan, 424 U.S. 392, 398 (1976) (characterizing the holding in United States v. King, 395 U.S. 1 (1969), as a holding that "the Declaratory Judgment Act did not grant the [United States] Court of Claims [(Court of Claims[9])] authority to issue declaratory judgments"); King, 395 U.S. at 5 (holding that the Court of Claims has no general authority to issue declaratory judgments); Suess v. United States, 33 Fed. Cl. 89, 92 (1995) ("[A]bsent statutory authorization, this court cannot grant equitable relief."). The court has statutory authorization to provide broad declaratory relief in certain categories of cases, including in the context of bid protests, for example. See 28 U.S.C. § 1491(b)(2); see also Halim v. United States, No. 12-5 C, 2012 WL 4356211, at *7 (Fed. Cl. Sept. 24, 2012) (describing statutory authorizations of the Court of Federal Claims to provide equitable relief in certain types of tax cases, disputes under the Contracts

[9] The United States Court of Claims (Court of Claims) is the predecessor court to this court and a predecessor to the United States Court of Appeals for the Federal Circuit. When acting in its appellate capacity, the Court of Claims created precedent that is binding on this court. South Corp. v. United States, 690 F.2d 1368, 1369 (Fed. Cir. 1982) (en banc).

Disputes Act of 1978 and pursuant to its bid protest jurisdiction). The court is also statutorily authorized to "issue orders [to any appropriate United States official] directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records," when such relief is "an incident of and collateral to" a money judgment. 28 U.S.C. § 1491(a)(2); see James v. Caldera, 159 F.3d 573, 580 (Fed. Cir. 1998) (interpreting "incident of and collateral to" to mean that non-monetary relief must be "tied and subordinate to a money judgment") (internal quotations omitted). However, the court lacks general authority to grant declaratory judgment in breach of contract cases that are outside these statutorily defined categories. See King, 395 U.S. at 5.

These limits on the court's authority to provide declaratory relief do not bar the court from making a ruling of law when such a ruling is "necessary to the resolution of a claim for money presently due and owing." Hydrothermal Energy Corp. v. United States (Hydrothermal), 26 Cl. Ct. 7, 16 (1992); see Pauley Petroleum, Inc. v. United States, 219 Ct. Cl. 24, 38, 591 F.2d 1308, 1315 (1979) (en banc) ("[M]erely because the court must make a ruling of law . . . in order to arrive at a money judgment does not render [the] court's decision a 'declaratory judgment' . . . .").

III. Discussion

Generally, the court considers whether jurisdictional requirements are met before turning to the merits of a plaintiff's claims. PODS, Inc. v. Porta Stor, Inc., 484 F.3d 1359, 1365 (Fed. Cir. 2007); see Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998) (stating the subject matter jurisdiction is a threshold matter). Here, because plaintiff's arguments are so protean, it is difficult to discern whether plaintiff is discussing the nature of a claim or how the claim accrued. In particular, jurisdictional analysis with respect to the statute of limitations is hindered by plaintiff's variable assertions. For example, plaintiff asserts--on the same page of its Response--both that defendant has "continuously breached" its purported drainage obligation "since at least 1986 by providing no drainage facilities or service at all" and that "no cause of action accrued until the Government made clear its intent to abandon its drainage obligation in September of 2010." Pl.'s Resp. 28 (internal quotation marks omitted); cf. id. at 40 ("Since the duty of immediate performance never arose, there was no breach."). Because of the difficulty in applying jurisdictional standards to irreconcilable assertions and because the substance of plaintiff's claims is intertwined with plaintiff's accrual theories, the court first considers whether--if plaintiff's Complaint were timely and otherwise within the court's jurisdiction--any of plaintiff's assertions would constitute a claim upon which relief can be granted.

A. Plaintiff Has Failed to State a Claim upon Which Relief Can Be Granted with Respect to Claims One Through Six

1. Claims One and Two: Breach of Contract

"To recover against the government for an alleged breach of contract, there must be, in the first place, a binding agreement." Anderson v. United States, 344 F.3d 1343, 1353 (Fed. Cir. 2003). Four requirements must be met for an agreement to bind the government: "(1) mutuality of intent to contract; (2) lack of ambiguity in offer and acceptance; (3) consideration; and (4) a government representative having actual authority to bind the United States in contract." Id. These requirements are the same whether the contract is express or implied. Trauma Serv. Grp. v. United States, 104 F.3d 1321, 1325 (Fed. Cir. 1997). Generally, statutory provisions will not be "incorporated into a contract with the government unless the contract explicitly provides for their incorporation." St. Christopher, 511 F.3d at 1384.

A contract is breached when a party fails to "perform a contractual duty when it is due." Winstar Corp. v. United States, 64 F.3d 1531, 1545 (Fed. Cir. 1995) (citing Restatement (Second) of Contracts § 235(2) (1981)), aff'd, 518 U.S. 839 (1996). "Non-performance includes defective performance as well as an absence of performance." Restatement (Second) of Contracts § 235 cmt. b.

Therefore, to survive defendant's Motion with respect to its breach of contract claims, plaintiff must have pleaded facts sufficient to allow the court to draw a reasonable inference, see Iqbal, 556 U.S. at 678, that defendant had an express or implied contractual duty to provide drainage and that defendant did not adequately perform such contractual duty when it was due, see Winstar Corp., 64 F.3d at 1545; Restatement (Second) of Contracts § 235(2) & cmt. b.

a. Past Breaches of Express Contractual Obligation

Defendant argues that "Westlands has failed to state a claim upon which relief can be granted because its complaint lacks sufficient factual allegations to establish, beyond a speculative level, the existence of a drainage obligation arising out of any of the contracts at issue." Def.'s Mot. at 14. Plaintiff responds that "beginning with the 1963 Contract, all contracts between Westlands and the Government expressly obligated the government to provide drainage." Pl.'s Resp. 9 (capitalization and emphasis omitted); see Compl. ¶ 5 ("Westlands included in all its contracts with the Government contractual obligations to build drainage facilities that incorporated the Government's statutory obligation."). However, plaintiff concedes that "[t]he Contracts . . . set no definite time for the government to provide drainage services, to construct a drainage system or even to construct discrete increments of a drainage system. Nor did they even set forth a construction schedule." Pl.'s Resp. 10. The court considers each of the contracts below.

i. 1963 Contract

a) Issue Preclusion

Plaintiff contends that "defendant is issue precluded from litigating whether the 1963 Contract obligates the government to provide drainage." Pl.'s Resp. 5 (capitalization and emphasis omitted). Plaintiff asserts that in prior litigation involving Westlands, "the court squarely held that the 1963 Contract required the Government to provide drainage." Id. Defendant responds that "[t]he sufficiency of Westlands'[] pleadings in this case has, of course, not been previously litigated or decided," Def.'s Reply 12, and that the issue in the previous litigation was not identical to the issue here, making issue preclusion inapplicable, id. at 12-13. Defendant also asserts that plaintiff's argument "overstates the holding of the decision in question." Id. at 12.

Under the doctrine of issue preclusion, a party that has litigated an issue on the merits and lost is precluded from relitigating that issue if four requirements are met: (1) the issue in the first action was identical to the issue before the court; (2) in the first action, the issue was actually litigated; (3) in the first action, the final judgment depended on the resolution of the issue; and (4) in the first action, the plaintiff had a full and fair opportunity to litigate the issue. Freeman, 30 F.3d at 1465; accord Masco Corp., 303 F.3d at 1329. Here, plaintiff's issue preclusion argument fails, both because the issue in the previous litigation was not identical to the issue here and because plaintiff misstates the court's ruling in the previous litigation.

The earlier case, United States v. Westlands Water District (Westlands I), was brought by the United States against Westlands after Westlands refused to pay full price--as required by federal reclamation law enacted in 1987--for federal water delivered to so-called excess lands. Westlands I, 134 F. Supp. 2d 1111, 1114-15 (E.D. Cal. 2001). The excess lands were lands exceeding a certain acreage within the Westlands water district, see Def.'s App. A34 (1963 Contract) (defining "excess land"), and the owners of the excess lands could receive water from Westlands only after executing contracts, referred to as "recordable contracts," in which the owners agreed to sell their excess land within ten years under certain terms, id. at A35; see Omnibus Adjustment Act of 1926, Pub. L. No. 69-284, § 46, 44 Stat. 636, 649 (codified as amended at 43 U.S.C. § 423e (2006)) (mandating sale of excess lands). Pursuant to the recordable contracts, the owners paid Westlands for water at a rate of eight dollars per acre-foot, a rate equal to the rate set forth in the 1963 Contract. See Westlands I, 134 F. Supp. 2d at 1115, 1138-39. Westlands collected these water charges and remitted payment to the United States for water service, pursuant to the 1963 Contract. See id. at 1115. The recordable contracts also contained a provision for the tolling of the ten-year period for selling excess lands (the tolling period) if "'water or service from the [Central Valley] Project [was] not . . . available to the land involved through no fault of [Westlands] or the Landowner.'" Id. at 1117 (quoting the recordable contracts).

The Westlands I court held that the landowners within Westlands water district were entitled to summary judgment that they had an enforceable right under the 1963 Contract, their recordable contracts and the Barcellos Judgment[10] to pay not the full price of water delivery as required by federal reclamation law but the eight dollar per acre-foot rate "for excess lands during any lawful [tolling period] caused by the government's failure, if any, to provide drainage." Westlands I, 134 F. Supp. 2d at 1158. The Westlands I court stated that the issue in the case before it was "the effect of an absence of drainage service on the full-cost provision and the [tolling] period." Id. at 1134. In evaluating that issue, the court stated that the term "service" in the portion of the recordable contracts related to the tolling period encompassed drainage service. Id.; see also id. at 1139-40 (discussing relevant provisions of the recordable contracts, which provided for tolling for any period in which "water or service" was not available). The court did not discuss or recognize any contractual drainage service obligation of the government to Westlands arising out of the 1963 Contract. See id. at 1138-39, 1142-43 (discussing provisions of the 1963 Contract). Instead, the Westlands I court stated that "[t]he 1963 Contract and the 1986 Barcellos Judgment [gave] a protectable contractual right to $8.00/acre-foot water for the water users' excess lands during any [tolling] periods caused by the government's failure, if any, to provide drainage service." Id. at

---

[10] In 1979, after the government challenged the validity of rates set by the 1963 Contract as a result of changes to federal reclamation laws, a group of landowners within the Westlands water district filed a class action suit to determine water priorities, with respect to both amount and price of water, against other landowners in the district, Westlands and the government. Barcellos & Wolfsen, Inc. v. Westlands Water Dist. (Barcellos), 491 F. Supp. 263, 264-65 (E.D. Cal. 1980); see Compl. ¶ 71. Westlands, named as a defendant in the suit, filed cross claims and counterclaims, "seeking a determination of the respective rights and duties of the parties under the [1963 Contract] and Federal Reclamation Law." Barcellos, 491 F. Supp. at 265. Westlands also filed another suit seeking similar relief, Westlands Water Dist. v. United States, No. CV F-81-245-EDP (E.D. Cal.), which was consolidated into Barcellos. Compl. ¶ 71; see Pl.'s App. 168 (Barcellos Judgment) (showing consolidation of No. CV F-81-245-EDP).

The consolidated cases ultimately settled, and judgment was entered pursuant to the parties' agreement. Compl. ¶ 73; see Pl.'s App. 167-222 (Barcellos Judgment). Notably, the Barcellos Judgment upheld the validity of the 1963 Contract. Compl. ¶ 73; see Pl.'s App. 177-80 (Barcellos Judgment). With respect to drainage, it required the government to "adopt and submit to [Westlands] by December 1, 1991, a Drainage Plan for Drainage Service Facilities," Pl.'s App. 186 (Barcellos Judgment); Compl. ¶ 74, and stated that the government would "make a good faith effort to construct water distribution and collector drainage facilities needed in the [Westlands Water] District in addition to those constructed under the 1965 [Repayment] Contract," Pl.'s App. 206 (Barcellos Judgment). However, the Barcellos Judgment was clear that "[n]othing in this Judgment . . . shall be deemed to create any obligation of the United States to provide any drainage service to [Westlands] or to construct Drainage Service Facilities." Id. at 222; see also id. at 173-74 (defining "Drainage Service Facility" broadly, to include the originally planned interceptor drain as well as any partial or full alternative to it)

1143. Because the issue in Westlands I--whether the eight-dollar per acre-foot rate or full cost provision applied for excess land owners during a tolling period, see id. at 1134,--is not identical to the issue raised in this case--whether the 1963 Contract obligated the government to provide drainage to Westlands, see Pl.'s Resp. 5 (characterizing "the issue presented here" as "whether the 1963 Contract obligated the Government to provide drainage").--issue preclusion is inapplicable, see Masco Corp., 303 F.3d at 1329; Freeman, 30 F.3d at 1465.

Issue preclusion is also inappropriate because plaintiff's issue preclusion argument is based on a mischaracterization of Westlands I. Plaintiff states that the Westlands I court saw the issue of "whether the [ten-year] period was tolled during periods when no drainage service was being provided" as dependent upon "whether the 1963 Contract obligated the Government to provide drainage." Pl.'s Resp. 6. As discussed above, this is simply not true: the Westlands I court addressed the price of water for excess land owners, not a purported obligation under the 1963 Contract to provide drainage. See Westlands I, 134 F. Supp. 2d at 1134. Nonetheless, plaintiff contends that "the Court's conclusion that 'the parties agreed in the 1963 Contract to ten years of subsidized water and drainage service' precludes the government from arguing now that the 1963 Contract does not require the Government to provide drainage." Pl.'s Resp. 6 (emphasis omitted) (quoting Westlands I, 134 F. Supp. 2d at 1143 n.72). Plaintiff takes the Westlands I court's language completely out of context. The text of the footnote cited by plaintiff in support of its argument reads, in relevant part:

> [T]he parties agreed in the 1963 Contract to ten years of subsidized water and drainage service for excess lands under recordable contract. However, if drainage service has not been provided, . . . then those ten years of "water and service" for the excess lands have not yet been provided . . . . In that case, [the portion of the recordable contracts related to the tolling period] extends the ownership and contract-priced water for the excess lands until 10 years of water and drainage service have been provided.

Westlands I, 134 F. Supp. 2d 1143 n.72 (first emphasis added). In other words, the footnote acknowledges that the portions of the 1963 Contract addressing excess lands created a scheme under which the excess lands would receive subsidized water and drainage service--meaning water and drainage service at the eight dollar per acre-foot rate--during the ten-year period for selling the excess lands. See id. However, if the ten-year period was tolled until drainage service was provided, pursuant to the recordable contracts, then the eight dollar rate--as opposed to the full cost of water delivery--would continue to apply. Id. This footnote, contrary to plaintiff's assertion, see Pl.'s Resp. 6, does not acknowledge any governmental obligation to provide drainage to Westlands arising out of the 1963 Contract; nor do the footnote and surrounding text cited by

plaintiff amount to a holding that Westlands has a contractual right to drainage under the 1963 Contract. Issue preclusion is therefore inappropriate.

b) Contract Terms

Plaintiff also contends that the 1963 Contract expressly obligated defendant "to sell water to Westlands and provide the drainage services and facilities necessary to drain the land to which that water was applied." Compl. ¶ 30. Plaintiff further contends that it agreed to build local drainage facilities to carry water to the interceptor drain "[i]n reliance o[n] the Government's commitment to build the Interceptor Drain." Pl.'s Resp. 11 (citing Def.'s App. A25 (1963 Contract) (authorizing connection of local drainage facilities to the interceptor drain)). Defendant replies that plaintiff has "fail[ed] to identify any provision of the 1963 Contract that obligated the government to provide drainage," Def.'s Mot. 15, and that the contract provisions cited by plaintiff in support of its argument refer only "to the parties' recognition that Interior intended to provide an interceptor drain as set forth in the San Luis Act," id. at 19-20.

The court now examines the provisions of the 1963 Contract cited by plaintiff as purported sources of a contractual drainage obligation. For the following reasons, the court concludes that none of these provisions creates such an obligation.

First, plaintiff cites the rate provision. See Pl.'s Resp. 11. The contract's rate provision includes a fifty-cent per acre-foot drainage service component. See Def.'s App. A15 (1963 Contract). Westlands argues that its position that this creates a contractual drainage obligation is strengthened by the contract provision that the drainage service component become payable when--not if--interceptor drain service became available. Pl.'s Resp. 11; cf. Def.'s App. A15 (1963 Contract). Defendant points out that the rate provision specifies only the "statutorily-required rate, as well as when and how Westlands would make payment" but "does not contain any language[]by which the United States allegedly undertook a drainage obligation." Def.'s Mot. 19. Defendant is correct; there is no language in the rate provision creating an express drainage obligation.

Federal reclamation law makes clear that, at the time the 1963 Contract was entered into, water service contract rates reflected the Secretary's estimate of annual operation and maintenance costs, as well as other fixed costs. See 1939 Act § 9(e), 53 Stat. at 1196. That a drainage service component was included in the 1963 Contract rate reflects only the estimated annual costs of operating and maintaining the planned drainage facilities. Cf. Chattler, 632 F.3d at 1330 (stating that a government representation must be stated in the form of an undertaking, not as a prediction or opinion, to be binding); Nat'l By-Prods., Inc., 186 Ct. Cl. at 560, 405 F.2d at 1264 (same). Based on its plain meaning, the rate provision is not a binding governmental obligation to undertake to complete the interceptor drain but is, instead, a binding

payment term. See McAbee, 97 F.3d at 1435 (stating that the plain language of an unambiguous contract provision controls). Similarly, the contract provision stating that the drainage component rate was not payable until interceptor drain service was available did not constitute a binding government undertaking to provide drainage; it was instead a statement of the government's prediction or intent that drainage service would be available in the future--and a binding obligation with respect to payment terms if and when the contemplated drainage service became available. Cf. Chattler, 632 F.3d at 1330; Nat'l By-Prods., Inc., 186 Ct. Cl. at 560, 405 F.2d at 1264.

Next, plaintiff asserts that "[f]urther confirmation of the Government's [drainage] obligation can be found in" the contract provision in which defendant "reserves the privilege to 'temporarily discontinue or reduce . . . the service of the interceptor drain.'" Pl.'s Resp. 12 (alteration in original). Plaintiff contends that "[w]ere the Government not obligated to provide drainage service," this provision would be unnecessary. Id. Defendant argues that, to the extent that any drainage obligation can be inferred from this provision, such an obligation must be statutory because the provision itself contains no language setting forth a binding government undertaking to provide drainage. Def.'s Reply 10 (citing Chattler, 632 F.3d at 1330).

Defendant is again correct; there is no language in this provision creating an express drainage obligation. The provision serves mainly as a notice provision with respect to the interceptor drain, providing that "so far as feasible the United States will give [Westlands] due notice in advance of such temporary discontinuance or reduction." See Def.'s App. A21 (1963 Contract). Such a provision is entirely consistent with defendant's statutory duty to provide drainage, cf. San Luis Act § 5, 74 Stat. at 159 (discussing Secretary's authority to construct, operate and maintain a drainage system for the San Luis unit); Firebaugh Canal Co. v. United States (Firebaugh), 203 F.3d 568, 578 (9th Cir. 2000) (holding that the government had a statutory duty under the San Luis Act to provide drainage to Westlands), and does not constitute a separate contractual undertaking to provide drainage. At most it represents defendant's prediction or intent that the interceptor drain will provide service to Westlands in the future. Cf. Chattler, 632 F.3d at 1330; Nat'l By-Prods., Inc., 186 Ct. Cl. at 560, 405 F.2d at 1264.

Plaintiff also cites to several nonoperative portions of the 1963 Contract, including two explanatory recitals and a definitional term, in support of its position. See Pl.'s Resp. 11. The third and fifth explanatory recitals state, respectively, in relevant part:

> WHEREAS, the United States is providing an interceptor drain to meet the drainage requirements of the San Luis Unit of the Federal Central Valley Project; and
>
> . . . .

> WHEREAS, [Westlands] desires to contract . . . for the furnishing by the United States of a supplemental water supply from the Project and for drainage service by means of the interceptor drain for which [Westlands] will make payment to the United States upon the basis, at the rate, and pursuant to the conditions hereinafter set forth[.]

Def.'s App. A5 (1963 Contract); see Pl.'s Resp. 11. The 1963 Contract defines "interceptor drain" as "the physical works constructed by the United States pursuant generally to the [San Luis Act] . . . in order to meet the drainage requirements of the area served by the San Luis Unit." Def.'s App. A6-7 (1963 Contract); see Pl.'s Resp. 11. Defendant contends that "[t]hese recitals and definition did not obligate the Government to provide drainage service," both because whereas clauses and definitions are not "operative portion[s] of the contract" and because "the language cited by Westlands does not amount to binding promises by the United States to provide drainage." Def.'s Mot. 16. Defendant further contends that, "to the extent the contract contemplated drainage, it stated drainage is a statutory obligation; it says nothing about a contractual duty." Id. at 17. Defendant is correct.

Courts do not interpret a government representation as a binding contractual obligation unless it is "stated in the form of an undertaking, not as a mere prediction or statement of opinion or intention." Chattler, 632 F.3d at 1330 (internal quotation marks omitted); Nat'l By-Prods., Inc., 186 Ct. Cl. at 560, 405 F.2d at 1264. Only where a contract contains vague and ambiguous language may the court look to factors outside the contractual terms, including to the explanatory recitals (or "whereas clauses"), to determine the parties' intent. KMS Fusion, 36 Fed. Cl. at 77. "'[W]hereas' clauses generally are not considered 'contractual' and cannot be permitted to control the express provisions of the contract . . . ."[11] Id.

Here, there is no basis for concluding from the explanatory recitals and definition that defendant was contractually obligated to provide drainage to plaintiff under the 1963 Contract. Plaintiff cites no operative contract provision that is susceptible to the interpretation that it created a drainage obligation because none of the provisions cited by plaintiff contains language creating a drainage obligation. Cf. McAbee, 97 F.3d at 1434-35 (stating that a contract is ambiguous if it is susceptible to more than one

[11] Plaintiff cites Solar Turbines, Inc. v. United States (Solar Turbines), 23 Cl. Ct. 142, 149 n.2 (1991) as an example of a case where the court construed an explanatory recital or "whereas clause" as implying a promise by the government. Pl.'s Resp. 8. However, the finding of the court in Solar Turbines was that the promise contained in the whereas clause at issue in that case (stating that the government was willing to provide additional funding to the plaintiff)--and its fulfillment--constituted consideration for the contract. See Solar Turbines, 23 Cl. Ct. at 149 n.2. The Solar Turbines court did not find that the whereas clause in that case was itself an enforceable contract provision.

interpretation). And even if the court were to look beyond the operative contract provisions to the explanatory recitals and definition for the parties' intent, cf. KMS Fusion, Inc., 36 Fed. Cl. at 77 (stating that a court may look outside the contractual terms, including to explanatory recitals, to determine the parties' intent only when the language of the contract is vague and ambiguous), it cannot conclude that the recitals and definition manifest an intent to create a contractual drainage obligation. At most, the third explanatory recital, see Def.'s App. A5 (1963 Contract), and the definition of "interceptor drain," see id. at A6-7, constitute a statement that defendant intended to fulfill its statutory duty to provide drainage pursuant to the San Luis Act, cf. St. Christopher, 511 F.3d at 1384 (stating that the United States Court of Appeals for the Federal Circuit (Federal Circuit) "has been reluctant to find that statutory . . . provisions are incorporated into a contract with the government unless the contract explicitly provides for their incorporation"). Similarly, the fifth explanatory recital, see Def.'s App. A5 (1963 Contract), establishes at most plaintiff's intent to contract for water supply and drainage service at the rates set out in the 1963 Contract. The recitals and definition do not create a binding contractual drainage obligation. Cf. Chattler, 632 F.3d at 1330; Nat'l By-Prods., Inc., 186 Ct. Cl. at 560, 405 F.2d at 1264.

For the foregoing reasons, with respect to the 1963 Contract, plaintiff has not pleaded sufficient facts to state a facially plausible claim for relief based on an express breach of contract theory. See Iqbal, 556 U.S. at 678; Twombly 550 U.S. at 570.

ii. 1965 Repayment Contract

Plaintiff alleges that "[t]he 1965 contract expressly, and independently, created an obligation of the government to provide drainage." Pl.'s Resp. 12 (capitalization and emphasis omitted). Defendant responds that plaintiff failed to allege a breach with respect to the 1965 Repayment Contract "because it acknowledges that segments of the project were constructed and that it has been repaying the construction costs incurred." Def.'s Reply 16. In other words, defendant argues that its contractual obligations, if any, to provide drainage pursuant to the 1965 Repayment Contract have been met. See id.

The 1965 Repayment Contract covered the costs of the actual construction of the San Luis unit, as required by federal reclamation law. See supra Part I.B.2. The substance of the bargain underlying the 1965 Repayment Contract is contained in two promises. First, defendant promised that, "[t]o the extent that funds [were then] or [t]hereafter [would] be available[,] . . . the United States [would] expend toward construction of a distribution system . . . a sum not in excess of" $157,048,000. Def.'s App. A131 (1965 Repayment Contract) (emphasis added). Notably, this provision conditioned construction of the contemplated distribution system for the San Luis unit, which included drainage, on the availability of funds. See id. (defining "distribution

system"). In return, plaintiff promised to "repay to the United States the actual cost of the distribution system constructed" up to $157,048,000. Id. at A134-35.

Under the terms of the 1965 Repayment Contract, the first phase of construction was to include "substantially all of the water distribution facilities, drainage collector facilities, and works for the integration of ground with surface water, . . . as initially required to serve [a certain portion of Westlands water district]." Id. at A132. Plaintiff began making payments pursuant to the 1965 Repayment Contract in or about 1979, Compl. ¶ 40; see id. ¶ 53, when the first phase of the subsurface drainage system connecting Westlands to the interceptor drain was completed, see id. ¶ 52. As defendant correctly notes, see Def.'s Reply 16, plaintiff does not allege that the completion of this portion of the construction, which resulted in drainage service to Westlands from 1979 to 1985, see Compl. ¶¶ 52, 58; Def.'s Mot. 7, failed to include "substantially all" of the facilities "initially required" to serve the portion of Westlands water district covered by the contract provision, see Pl.'s Resp. 13-14 (discussing its claim for breach of the 1965 Repayment Contract); cf. Def.'s App. A132 (1965 Repayment Contract).

Instead, plaintiff's argument that defendant has breached a duty to provide drainage pursuant to the 1965 Repayment Contract appears to be based on the fact that the interceptor drain and construction contemplated by the 1965 Repayment Contract were not completed.[12] See Pl.'s Resp. 13-14 (pointing to, apparently in support of its position that defendant was committed to providing drainage as contemplated by the 1965 Repayment Contract, maps showing the contemplated interceptor drain and other contemplated construction and the schedule for the proposed construction phases). Following completion of the first phase of construction, the government determined--incorrectly, according to plaintiff--that funds were insufficient for the completion of the remaining two phases of contemplated construction. See Compl. ¶¶ 54-55. However, the availability of funds was a condition precedent for performance of the contemplated construction. See Def.'s App. A131 (1965 Repayment Contract). Moreover, plaintiff's own acknowledgment that "[t]he Contracts . . . set no definite time for the government to provide drainage services, to construct a drainage system or even to construct discrete increments of a drainage system," Pl.'s Resp. 10, belies plaintiff's assertion that the 1965 Repayment Contract obligated defendant to complete the contemplated construction. Instead, the 1965 Repayment Contract obligated plaintiff to repay the government for

[12] Defendant contends that, to the extent that plaintiff argues that a contractual obligation arose out of the 1965 Repayment Contract with respect to the interceptor drain, such an argument must fail because the 1965 Repayment Contract pertains only to local drainage systems. Def.'s Reply 17 (citing 43 U.S.C. § 485h(d)-(e) (2006)). The court does not address whether the distribution system covered by the 1965 Repayment Contract included the interceptor drain because, as discussed in Part III.A.1a.ii above, the court finds that plaintiff has not pleaded facts sufficient to allege any unmet contractual obligation to provide drainage. Therefore, the court need not reach the issue.

actual costs of building facilities that defendant had a statutory obligation to provide. See San Luis Act § 1(a), 74 Stat. at 156; see also St. Christopher, 511 F.3d at 1384 (stating that the Federal Circuit "has been reluctant to find that statutory . . . provisions are incorporated into a contract with the government unless the contract explicitly provides for their incorporation").

Plaintiff's arguments to the contrary are not persuasive. For example, plaintiff cites to the third and sixth explanatory recitals for the proposition that providing "a drainage collector system" was "[a]n expressed purpose of this agreement." Pl.'s Resp. 12. Those recitals state:

> WHEREAS, [Westlands], in order to utilize . . . the water supply made available under the [1963 Contract] and such future contracts as may be made between the United States and [Westlands], desires that a water distribution and drainage collector system be constructed for [Westlands water district] by the United States . . . pursuant to federal reclamation laws; and
>
> . . . .
>
> WHEREAS, the United States is willing to undertake the construction of the aforementioned water distribution and drainage collector system under the conditions hereinafter set forth[.]

Def.'s App. A130 (1965 Repayment Contract). As discussed above with respect to the 1963 Contract, recitals are generally not considered contractual, and government representations are not binding contractual obligations unless stated as an undertaking rather than an intention. See supra Part III.A.1.a.i. Here, the third recital merely states plaintiff's desire that drainage be constructed, and the sixth recital expresses a government intention to undertake construction of drainage but does not itself contain a present undertaking. Cf. Chattler, 632 F.3d at 1330 (stating that, to be binding, a government representation must be "stated in the form of an undertaking, not as a mere prediction or statement of opinion or intention" (internal quotation marks omitted)); Nat'l By-Prods., Inc., 186 Ct. Cl. at 560, 405 F.2d at 1264 (same). However, even if the sixth recital could be interpreted as an undertaking to construct drainage, such an undertaking is limited by the terms of the 1965 Repayment Contract, which do not obligate defendant beyond the performance already rendered under the agreement because construction was conditioned on the availability of funds. See Def.'s App. A131 (1965 Repayment Contract); cf. McAbee, 97 F.3d at 1435 (stating that unambiguous contract terms "must be given their plain and ordinary meaning").

Plaintiff also cites to the best efforts clause, by which the parties agreed to "'exert their best efforts to expedite the completion' of the 'distribution system.'" Pl.'s Resp. 14

(quoting Def.'s App. at A132 (1965 Repayment Contract)). However, plaintiff merely quotes this provision without explaining how it supports plaintiff's position. See id.; see also Def.'s Reply 16 ("Westlands has not alleged the Government failed to comply with the . . . best efforts clause[] or identified any related damages"). Moreover, defendant argues that, in any event, such a claim would be time-barred. Def.'s Mot. 24; Def.'s Reply 16. Defendant is correct. The first phase of construction was completed in 1979, Compl. ¶ 52, so, to the extent that plaintiff is attempting to allege any breach of the best efforts clause with respect to the first phase of construction, such a claim would be time-barred, see 28 U.S.C. § 2501 (providing for six-year statute of limitation in the Court of Federal Claims). With respect to phases two and three of construction contemplated by the 1965 Repayment Contract, commencement of construction--conditioned on the availability of funds--was scheduled for 1974 and 1979, respectively. See Def.'s App. A131, A133 (1965 Repayment Contract). Therefore, any claim alleging a breach of the best efforts clause as a result of defendant's determination that funds were not available to begin construction of phases two and three at the anticipated times would also be time-barred. See 28 U.S.C. § 2501. Finally, the maps relied on by plaintiff, "show[ing] drainage facilities, including the Interceptor Drain," and the "drainage collector system" do not constitute a "commitment" by the government to provide drainage, cf. Pl.'s Resp. 13-14, but reflect, at most, the intent of the government to complete the construction in accordance with the maps, cf. Chattler, 632 F.3d at 1330; Nat'l By-Prods., Inc., 186 Ct. Cl. at 560, 405 F.2d at 1264.

Plaintiff's citations to the 1965 Repayment Contract--without explanation or analysis--and conclusory statement that "a clearer commitment to provide drainage is hard to imagine," see Pl.'s Resp. 13-14, do not suffice to state a claim upon which relief can be granted, cf. Iqbal, 556 U.S. at 678. Plaintiff has not alleged facts sufficient to state a facially plausible claim for relief based on an express breach of the 1965 Repayment Contract. See id.; Twombly 550 U.S. at 570.

iii. 2007 Interim Contract

Plaintiff argues that "the 2007 Interim Renewal Contract carried forward the drainage obligations created by the 1963 and 1965 Contracts," Pl.'s Resp. 14 (capitalization and emphasis omitted), and did not "abrogate[e] the obligation to provide drainage created by the 1963 and 1965 Contracts," id. at 16. However, neither the 1963 Contract nor the 1965 Repayment Contract created a drainage obligation, see supra Parts III.A.1.a.i-ii, and any references that they make to defendant's statutory drainage obligation did not transform it into a contractual one, cf. St. Christopher, 511 F.3d at 1384. Nor do the specific provisions of the 2007 Interim Contract cited by plaintiff give rise to such an obligation.

First, plaintiff cites a number of recitals to the 2007 Interim Contract and states that in those recitals, defendant "acknowledge[d] its obligation to provide drainage under Firebaugh,"[13] represented its intention, "to the extent appropriated funds are available, to develop and implement" drainage solutions for the San Luis unit, and noted actions it has

[13] After the completed portion of the interceptor drain was closed in 1986, Westlands and other landowners inside and outside the San Luis unit sued the government in Sumner Peck Ranch, Inc. v. Bureau of Reclamation (Sumner Peck), 823 F. Supp. 715 (E.D. Cal. 1993), and Firebaugh Canal Co. v. United States (Firebaugh), 203 F.3d 568 (9th Cir. 2000), seeking completion of the interceptor drain. See Firebaugh, 203 F.3d at 572 (citing, inter alia, Sumner Peck, 823 F. Supp. 715); Compl. ¶ 81. These lawsuits were partially consolidated in Firebaugh in 1992 "to resolve the plaintiffs' mutual allegation that the Secretary of the Interior is required by law to construct facilities to drain agricultural drainage water from certain lands in Westlands Water District." Firebaugh, 203 F.3d at 572; see Compl. ¶ 81.

With respect to the consolidated portion of the cases, the district court in Firebaugh concluded "that the San Luis Act established a mandatory duty to provide drainage that had not been excused" by impossibility. Firebaugh, 203 F.3d at 572. In 1995, the district court entered partial final judgment on that issue and ordered the government to "'without delay, take such reasonable and necessary actions to promptly prepare, file, and pursue an application for a discharge permit for the [interceptor drain] to comply with . . . the San Luis Act to provide drainage to the San Luis Unit.'" Mem. Decision Granting Fed. Defs.' Mot. for Entry of J. (Firebaugh J. Order) at 2, Firebaugh, Nos. 1:88-cv-00634 LJO DLB & 1:91-cv-00048 LJO DLB (partially consolidated), Dkt. No. 943 (E.D. Cal. Mar. 13, 2012) (quoting Order of Mar. 12, 1995, Dkt. No. 442, at 11-12).

On appeal, the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) affirmed the government's "duty to provide drainage service under the San Luis Act" but reversed the portion of the district court judgment "that foreclose[d] non-interceptor drain solutions," stating that "subsequent Congressional action has given discretion to the Department [of Interior] in creating and implementing a drainage solution." Firebaugh, 203 F.3d at 578. The Ninth Circuit further declared that "the time has come for the Department of Interior and the Bureau of Reclamation to bring the past two decades of studies, and the 50 million dollars expended pursuing an 'in valley' drainage solution, to bear in meeting its duty to provide drainage under the San Luis Act." Id. On remand in 2000, the government was "ordered to submit 'a detailed plan describing the action . . . they will take to promptly provide drainage to the San Luis Unit.'" Firebaugh J. Order 2 (quoting Order of Dec. 18, 2000, Dkt. No. 654, at 4). Final judgment was ordered in the Firebaugh case on March 19, 2012--after the remaining claims in the case were resolved--but the final judgment did not disturb the partial final judgment concerning the government's statutory duty to provide drainage to the San Luis unit. Final J. on Claims in Pls.' Fifth Am. Compl. at 1, Firebaugh, Nos. 1:88-cv-00634 LJO DLB & 1:91-cv-00048 LJO DLB (partially consolidated), Dkt. No. 945 (E.D. Cal. Mar. 19, 2012). The district court retains jurisdiction to enforce the partial final judgment. Id. at 1-2; see also Firebaugh J. Order 2 (stating that, following the partial judgment, the district court reserved jurisdiction to enforce compliance).

taken toward providing a drainage solution. Pl.'s Resp. 15 (internal quotation marks omitted) (citing Def.'s App. A49-50 (2007 Interim Contract)). Defendant responds that "the recitals identified by Westlands refer and relate to the Government's obligation to provide drainage and the efforts taken in that regard; they are not relevant to any potential contractual obligation." Def.'s Reply 14. Defendant is correct.

Recitals are generally not considered contractual, and government representations are not binding contractual obligations unless stated as an undertaking rather than an intention. See supra Part III.A.1.a.i. The recitals cited by plaintiff contain only statements of intention or representations of actions already taken, not contractual statements of a present undertaking. Cf. Chattler, 632 F.3d at 1330; Nat'l By-Prods., Inc., 186 Ct. Cl. at 560, 405 F.2d at 1264. Further, the reference in a recital to Firebaugh, 203 F.3d 568, relates to defendant's statutory duty to provide drainage, see id. at 578 (affirming the trial court's holding that the government had a statutory duty under the San Luis Act to provide drainage to Westlands, but reversing the trial court's holding that the government's drainage obligation was required to be satisfied by the construction of an interceptor drain)--and does not purport to incorporate this statutory duty into the contract, cf. St. Christopher, 511 F.3d at 1384. Plaintiff has not alleged facts sufficient to support a drainage obligation arising out of the explanatory recitals to the 2007 Interim Contract.

Plaintiff also cites, see Pl.'s Resp. 15, a drainage service rate provision of the 2007 Interim Contract (the drainage service rate provision), which provides, "The Contracting Officer shall notify the contractor in writing when drainage service becomes available . . . [and thereafter] shall provide drainage service to [Westlands] at rates established pursuant to then-existing ratesetting policy for Irrigation Water," Def.'s App. A82 (2007 Interim Contract); see id. at A112 (2007 Interim Contract Ex. B (2007 rates and charges)) (showing a 2007 rate of twenty-four cents for operation and maintenance of the interceptor drain). However, any drainage obligation contained in this drainage service rate provision is expressly conditioned on drainage service becoming available, see id. at A82 (2007 Interim Contract), and this condition has not been met. Nonetheless, plaintiff appears to suggest that the drainage service rate provision, along with the 2007 rates and charges included as Exhibit B to the 2007 Interim Contract, create an affirmative contractual obligation of the government to make drainage service available--but plaintiff neither expressly makes that argument nor explains how these provisions would give rise to such an obligation. See Pl.'s Resp. 15-16. Defendant responds that "[the drainage service rate] provision is merely a notification provision and does not give rise to a duty to provide drainage" and that drainage-related rate information in the contract--like the rate information set forth in the 1963 Contract--provides only "the rate information . . . required by statute but contains no language by which the United States undertakes any drainage obligation." Def.'s Reply 14.

Defendant is correct: such a provision is entirely consistent with defendant's statutory duty to provide drainage and does not constitute a contractual undertaking to provide drainage service. At most it represents defendant's prediction or intent that drainage service will be provided to Westlands in the future. Cf. Chattler, 632 F.3d at 1330; Nat'l By-Prods.,Inc., 186 Ct. Cl. at 560, 405 F.2d at 1264. Moreover, there is no language in either the drainage service rate provision, see Def.'s App. A82 (2007 Interim Contract), or the 2007 rates and charges in Exhibit B to the 2007 Interim Contract, see id. at A112 (2007 Interim Contract Ex. B (2007 rates and charges)), that creates an express obligation to provide drainage service. Pursuant to federal reclamation law, a water service contract must include "such rates as in the Secretary's judgment will produce revenues at least sufficient to cover an appropriate share of the annual operation and maintenance cost and an appropriate share of such fixed charges as the Secretary deems proper." 43 U.S.C. § 485h(e). As with the 1963 Contract, see supra Part III.A.1.a.i, the inclusion of drainage-related rate information reflects only estimated annual operating and maintenance costs and other fixed charges with respect to future drainage service anticipated by defendant; it is not an affirmative present undertaking by the government to provide drainage service, cf. Chattler, 632 F.3d at 1330; Nat'l By-Prods., Inc., 186 Ct. Cl. at 560, 405 F.2d at 1264.

Therefore, with respect to the 2007 Interim Contract, plaintiff has not pleaded facts that would "raise a right of relief above the speculative level." Cf. Twombly, 550 U.S. at 555.

iv. 2010 Interim Contract

The 2010 Interim Contract incorporated the terms of the 2007 Interim Contract. See Def.'s App. A122 (2010 Interim Contract); Compl. ¶ 46; Def.'s Mot. 6. Plaintiff does not allege that this contract created a separate contractual right to drainage service but, instead, asserts that it did not "abrogate the obligation to provide drainage created by the 1963 and 1965 Contracts." Pl.'s Resp. 16. However, because neither the 1963 Contract nor the 1965 Repayment Contract created a general drainage obligation, see supra Parts III.A.1.a.i-ii, plaintiff's argument fails. Accordingly, plaintiff has not pleaded facts that would "raise a right of relief above the speculative level" with respect to the 2010 Interim Contract. Cf. Twombly, 550 U.S. at 555.

Although the court is required to "accept as true all the factual allegations in the complaint" and to "make all reasonable inferences in favor of the non-movant" when ruling on a 12(b)(6) motion, Sommers Oil, 241 F.3d at 1378, the court is "not bound to accept as true a legal conclusion couched as a factual allegation," Papasan, 478 U.S. at 286; see Twombly, 550 U.S. at 555. Here, plaintiff has pointed to a number of contractual provisions that, it contends, constitute an express obligation to provide drainage to Westlands. See supra Part III.A.1.a. However, plaintiff's legal conclusion is

simply not supported by the plain language of the contracts. See supra Part III.A.1.a; cf. McAbee, 97 F.3d at 1435. Indeed, as plaintiff points out, "[t]he Contracts . . . set no definite time for the Government to provide drainage services, to construct a drainage system or even to construct discrete increments of a drainage system. Nor did they even set forth a construction schedule." Pl.'s Resp. 10. Accordingly, the court holds that no provision of the 1963 Contract, the 1965 Repayment Contract, the 2007 Interim Contract nor the 2010 Interim Contract creates an express contractual obligation of defendant to provide drainage to Westlands.[14]

b. Past Breaches of Implied Contractual Obligation

Defendant contends that plaintiff "has not alleged any facts that would show the existence of an implied contractual obligation," both because an implied contract cannot exist when an express contract between the parties governs the same subject and because plaintiff has not alleged any facts sufficient to show the existence of a separate implied contract. Def.'s Mot. 24-25. With respect to the first issue raised by defendant, plaintiff responds that, if the court concludes that there is no express contract with regard to drainage, an implied contract can be found, Pl.'s Mot. 17, and that, "[m]oreover, the implied contract Westlands alleges can be upheld as a modification of the express contract," id. at 18. With respect to the second issue raised by defendant, plaintiff states that its "Complaint alleges a multitude of specific facts that would support a finding of a contract implied in fact, or an amendment of the express contracts by subsequent words and conduct." Id. at 19. Plaintiff states that these alleged facts include: the fact that drainage is necessary for irrigation, the inclusion of a drainage component in plaintiff's water service contract rates since 1967, plaintiff's consistent payment of drainage-related charges, the court's "holding" in Westlands I, the various explanatory recitals cited by plaintiff in which defendant expresses an intent to provide drainage and plaintiff's reliance on defendant's expressed intent to provide drainage. Id.

An implied-in-fact contract requires a "meeting of the minds," which "is inferred, as a fact, from conduct of the parties showing . . . their tacit understanding." Trauma Serv. Grp., 104 F.3d at 1326 (internal quotation marks omitted); cf. Anderson, 344 F.3d at 1353 (requiring mutuality of intent to contract). "In short, an implied-in-fact contract arises when an express offer and acceptance are missing but the parties' conduct indicates

[14] Westlands argues that, "[a]t the most[,] from the perspective of the Government's Motion, the Contracts are ambiguous as to the existence of [a drainage] obligation, and the Motion must be denied for that reason alone." Pl.'s Resp. 16 n.6. However, the court finds that the plain language of the contracts does not give rise to a contractual drainage obligation and, therefore, that the contracts are not ambiguous with respect to that issue. See Dart Advantage Warehous., Inc. v. United States, 52 Fed. Cl. 694, 700 (2002) ("It is not enough that the parties differ in their interpretation of the contract clause.") (citing Cmty. Heating & Plumbing Co. v. Kelso, 987 F.2d 1575, 1578 (Fed. Cir. 1993)).

mutual assent." City of Cincinnati v. United States, 153 F.3d 1375, 1377 (Fed. Cir. 1998). As with an express contract, an implied-in-fact contract with the United States requires a government agent with actual authority to contract. Id. at 1377; Trauma Serv. Grp., 104 F.3d at 1326. The "risk of having accurately ascertained that he who purports to act for the government does in fact act within the bounds of his authority" is assumed by the private contracting party. Schism v. United States, 316 F.3d 1259, 1278 (Fed. Cir. 2002) (citing Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947)). An implied-in-law contract, on the other hand, imputes a promise to perform a legal duty by fiction of law when no intent to contract is shown. Algonac Mfg. Co. v. United States, 192 Ct. Cl. 649, 674, 428 F.2d 1241, 1255 (1970) (citing Balt. & Ohio R.R. v. United States, 261 U.S. 592, 597 (1923) and 17 C.J.S. Contracts § 4 (1963)). The Court of Federal Claims has jurisdiction over claims involving implied-in-fact contracts but lacks jurisdiction over claims based on contracts implied in law. Id. at 1256.

Regarding the issue of whether an implied contract and express contract can coexist, "[i]t is well settled that the existence of an express contract precludes the existence of an implied-in-fact contract dealing with the same subject matter, unless the implied contract is entirely unrelated to the express contract." Schism, 316 F.3d at 1278; see Trauma Serv. Grp., 104 F.3d at 1326. Here, the facts cited by plaintiff in support of its implied contract argument do not support such an argument because they are too closely related to the subject matter of the express contracts. Cf. Schism, 316 F.3d at 1278; Trauma Serv. Grp., 104 F.3d at 1326. Indeed, the facts cited by plaintiff in support of its implied contract claim consist primarily of portions of the four express contracts and examples of plaintiff's performance under those contracts, specifically: inclusion of a drainage component in plaintiff's water service contract rates since 1967, plaintiff's consistent payment of drainage-related charges pursuant to each of the contracts, defendant's intent to provide drainage expressed in explanatory recitals to the contracts, and plaintiff's purchase of water from defendant pursuant to the water service contracts. Pl.'s Resp. 19. These facts do not support plaintiff's implied contract argument because an implied contract based on portions of the express contracts or plaintiff's performance under them would be related to the express contracts and deal with the same subject matter. Cf. Schism, 316 F.3d at 1278 (stating that "an express contract precludes the existence of an implied-in-fact contract dealing with the same subject matter"). Plaintiff also cites the court's holding in Westlands I in support of its implied contract claim. Pl.'s Resp. 19. However, plaintiff's assertion that the Westlands I court "held that both water and drainage service were the predominant benefit of the bargain to Westlands under the Contracts," id. (internal quotation marks omitted), is an assertion of a fact that, if true, would be related to the express contracts because it is an interpretation of the express contracts--and, therefore, could not support an implied contract claim that was "entirely unrelated to the express contract[s]," cf. Schism, 316 F.3d at 1278.

Finally, plaintiff asserts in support of its implied contract claim the additional fact that drainage is necessary for irrigation. Pl.'s Resp. 19. However, this fact does not implicate any conduct by the parties from which mutual assent can be inferred and, therefore, does not support plaintiff's implied contract claim. Cf. City of Cincinnati, 153 F.3d at 1377 (stating that an implied contract arises when "the parties' conduct indicates mutual assent").

Plaintiff's breach of implied contract claim fails because any implied contract that could arise from the facts pleaded by plaintiff would be precluded owing to the close relationship between the facts pleaded by plaintiff and the subject matter of the express contracts. Cf. Schism, 316 F.3d at 1278; see Trauma Serv. Grp., 104 F.3d at 1326. Plaintiff has not pleaded other, unrelated facts sufficient to allow the court to draw a reasonable inference that the parties mutually assented to a contractual drainage obligation. Cf. Iqbal, 556 U.S. at 678; Anderson, 344 F.3d at 1353.

Similarly, plaintiff also fails to show that the implied contract it alleges was a modification of the express contracts because most of the facts cited by plaintiff as evidence of an implied contract are either provisions of the express contracts or examples of plaintiff's performance in compliance with them. Cf. Pl.'s Resp. 19 (listing "specific facts" that plaintiff claims "would support a finding of a contract implied in fact, or an amendment of the express contracts by subsequent words and conduct"). In other words, the facts alleged by plaintiff do not show any modification or amendment to the contracts because they consist of the contract terms themselves, provide an alleged interpretation of the contract terms or are consistent with performance of the contract terms--none of which tends to show amendment or modification of the contract terms.

2. Claims Three to Five: Related Breach of Contract Claims

a. Breach of Implied Obligation of Good Faith and Fair Dealing

Government contracts, like all other contracts, include an implied duty of good faith and fair dealing, which requires that each party not interfere with the other party's rights under the contract. Precision Pine & Timber, Inc. v. United States (Precision Pine), 596 F.3d 817, 828 (Fed. Cir. 2010); Centex Corp. v. United States (Centex), 395 F.3d 1283, 1304 (Fed. Cir. 2005). Because this implied duty protects contractual rights, exactly what it "entails depends in part on what [a given] contract promises." Precision Pine, 596 F.3d at 830; see Scott Timber Co. v. United States, 692 F.3d 1365, 1372 (Fed. Cir. 2012) ("[T]he existence of the covenant of good faith and fair dealing depends on the existence of an underlying contractual relationship . . . ." (brackets and internal quotation marks omitted)). Significantly, a party's contractual obligations are not expanded by the implied duty of good faith and fair dealing. Precision Pine, 596 F.3d at 831; see Bradley v. Chiron Corp., 136 F.3d 1317, 1326 (Fed. Cir. 1998) (citing Racine & Laramie, Ltd. v.

Cal. Dep't of Parks & Recreation, 14 Cal. Rptr. 2d 335, 339 (Cal. Ct. App. 1992) for the proposition that "implied covenants of good faith and fair dealing are limited to assuring compliance with the express terms of the contract and [cannot] be extended to create obligations not contemplated in the contract").

To support a claim for breach of the implied obligation of good faith and fair dealing with respect to a government contract, a plaintiff must show that the government acted in a way "specifically designed to reappropriate the benefits the other party expected to obtain from [the contract], thereby abrogating the government's obligations under the contract." Precision Pine, 596 F.3d at 829; Centex, 395 F.3d at 1311. In other words, "liability only attaches if the government action 'specifically targeted' a benefit" of the government contract at issue, Precision Pine, 596 F.3d at 830, "so as to destroy the reasonable expectations of the other party regarding the fruits of the contract," Centex, 395 F.3d at 1304. A showing of bad faith is not an element of the claim. See Precision Pine, 596 F.3d at 830. When a contractual benefit is expressly qualified, there is no breach of the duty of good faith and fair dealing when interference with contractual performance is in the manner contemplated and provided for. Id. at 830-31.

Here, plaintiff's claim focuses principally on allegations of bad faith, as evidenced by plaintiff's contention that "the government's bad faith is palpable and specifically and exhaustively pled." Pl.'s Resp. 20 (capitalization and emphasis omitted). In support of this contention, plaintiff points to the closing of the Kesterson Reservoir and completed portion of the interceptor drain and the fact that the government has not provided drainage since Westlands' local drainage collector system was plugged in 1986. Id. Plaintiff also points to prior litigation, including Barcellos and Firebaugh, citing the government's failure to provide drainage pursuant to court orders in those cases as further evidence of bad faith. Id. at 21-22. Finally, plaintiff alleges that a 2010 letter from the Commissioner of the Bureau of Reclamation to United States Senator Diane Feinstein (the Feinstein Letter) "abandoned Westlands to its own devices, stating that if the local water districts did not come up with a drainage solution themselves, the [Bureau of Reclamation] would cut off their water." Id. at 22. Plaintiff summarizes its argument:

> And so here we are, 12 years after the [Firebaugh court] ordered the Government to provide actual drainage "promptly," and 26 years after the drain was plugged, without a spade in the ground, without one yard of earth moved, without one drainage-related facility built and with not a drop of water being drained from Westlands' lands.

Id. Defendant responds that "Westlands has failed to show a contractual obligation to provide drainage to which the duty of good faith and fair dealing could attach," a failure that, defendant contends, is "fatal to [plaintiff's] claim of breach of the implied duty of good faith and fair dealing." Def.'s Mot. 26.

Defendant is correct. As discussed in detail above, plaintiff has failed to show a contractual duty to provide drainage arising out of any of the 1963 Contract, the 1965 Repayment Contract, the 2007 Interim Contract, the 2010 Interim Contract or any implied contract. See Part III.A.1. Therefore, there is no contractual drainage duty to which the implied duty of good faith and fair dealing can attach. Cf. Precision Pine, 596 F.3d at 830 (stating that the implied duty of good faith and fair dealing depends on what is promised in a given contract). Further, plaintiff has not shown that defendant acted to deprive plaintiff of the fruits of the contracts or to abrogate governmental obligations under the contracts. Because plaintiff failed to show that drainage service was a bargained-for benefit of any of these contracts, plaintiff has not shown that drainage service is a "fruit" of any of the contracts. Cf. Centex, 395 F.3d at 1304 (stating that a breach of the implied obligation of good faith and fair dealing occurs when a party "destroy[s] the reasonable expectations of the other party regarding the fruits of the contract"). Nor could any contractual drainage obligation of the government be abrogated when no such obligation existed. Cf. Precision Pine, 596 F.3d at 829 (stating that a claim for breach of the implied duty of good faith and fair dealing requires a showing of an abrogation of the government's obligations under the contract); Centex, 395 F.3d at 1311.

Moreover, the contracts specifically contemplated that funds may not be available for completing the planned drainage system construction. The construction contemplated by the 1965 Repayment Contract was expressly conditioned on the availability of funds, see supra Part III.A.1.a.ii, and the 1963 Contract included a provision that stated that, with respect to any performance of the United States that required appropriations by Congress or other allotment of funds, the unavailability of such funds would "not relieve [Westlands] from any obligations then accrued under this contract, and no liability [would] accrue to the United States in case such funds are not appropriated or allotted," Def.'s App. A39 (1963 Contract). By the plain language of the contract, plaintiff accepted the risk that it would have to keep making payments under the 1963 Contract, including the drainage component, even if drainage was not constructed. Cf. Precision Pine, 596 F.3d at 830-31 (stating that there was no violation of the implied duty of good faith and fair dealing when interference with performance was contemplated and provided for in the contract).

For these reasons, plaintiff's attempt to use the implied duty of good faith and fair dealing to expand the government's contractual obligations fails. Cf. Precision Pine, 596 F.3d at 831 (stating that the implied duty of good faith and fair dealing cannot be used to expand contractual obligations); Bradley, 136 F.3d at 1326. Plaintiff, therefore, has not pleaded sufficient facts to state a plausible claim for relief on the theory that the government breached an implied obligation of good faith and fair dealing. Cf. Iqbal, 556 U.S. at 678.

b. Total Breach of Contractual Drainage Obligations[15]

A total breach of contract occurs when the breach "'so substantially impairs the value of the contract to the injured party at the time of the breach that it is just in the circumstances to allow him to recover damages based on all his remaining rights to performance.'" Hansen Bancorp, Inc. v. United States (Hansen), 367 F.3d 1297, 1309 (Fed. Cir. 2004) (quoting Restatement (Second) of Contracts § 243(4)). To establish a total breach, a plaintiff must show that the breach was "material, substantial, essential, or vital"--that it "went to the root of the defendant's [contractual] obligation." First Annapolis Bancorp, Inc. v. United States (First Annapolis), 89 Fed. Cl. 765, 800 (2009) (internal quotation marks omitted); Restatement (Third) of Restitution and Unjust Enrichment § 37 cmt. c (2011). When a party to a contract is in total breach, the non-breaching party may elect "to declare the contract terminated and sue for total breach or to continue the contract and sue for partial breach." Pac. Gas & Electric Co. v. United States (PG&E), 70 Fed. Cl. 766, 771 (2006); see Cities Serv. Helex, Inc. v. United States, 211 Ct. Cl. 222, 234-35, 543 F.2d 1306, 1313 (1976). However, a party waives it right to restitution for total breach when it accepts or receives partial performance. See Mobil Oil Exploration & Producing Se., Inc. v. United States (Mobil Oil), 530 U.S. 604, 622 (2000) ("[A]cceptance of performance under a once-repudiated contract can constitute a waiver of the right to restitution that repudiation would otherwise create."); PG&E, 70 Fed. Cl. at 772.

Here, plaintiff contends that it "contracted for the provision of drainage in 1963 and 1965," but, "since 1986, the Government has provided only studies, evaluations, and planning" while "Westlands has been continuously paying for drainage." Pl.'s Resp. 24. Plaintiff concludes, "This is as total a breach as there can be." Id. Defendant does not address plaintiff's total breach claim specifically but contends that "Westlands failed to state a claim upon which relief can be granted because it failed to identify any contract provision that created a drainage obligation arising out of any of the contracts at issue. . . . Thus, Westlands'[] breach of contract claims fail." Def.'s Reply 1-2; cf. Pl.'s Resp. 23 ("[T]he Government appears to limit its theory here to the claim that there is no contractual obligation to be totally breached.").

---

[15] Plaintiff reasons that its fourth claim for relief (total breach) is distinct from its first three breach of contract claims (past breaches of an express or implied contractual drainage obligation, see supra Part III.A.1, and past breach of the implied obligation of good faith and fair dealing, see supra Part III.A.2.a) because, although those claims "seek damages for the Government's failure to provide drainage in the past," "this claim looks to the future[] and claims damages for the remaining performance due under the contract," Pl.'s Resp. 23. It is unclear, therefore, whether plaintiff asserts partial breach claims in its first three claims (as distinguished from its total breach claim asserted in claim four), or whether plaintiff is asserting different claims based on different theories of damages. Plaintiff's theory of partial breach is discussed further in Part III.B.1.a.i.

Defendant is correct: plaintiff's claim of total breach fails because plaintiff has not alleged a breach of defendant's remaining contractual obligations. Cf. First Annapolis, 89 Fed. Cl. at 800; Restatement (Third) of Restitution and Unjust Enrichment § 37 cmt. c. As discussed above, see supra Part III.A.1, plaintiff did not contract for the provision of drainage in any of the contracts at issue. Accordingly, plaintiff has no remaining right to the government's performance of a contractual drainage obligation under any of these contracts because no such right or obligation ever existed. Cf. Hansen, 367 F.3d at 1309 (stating that a claim for material breach allows a party to recover damages for its remaining rights to performance under the contract); Restatement (Second) of Contracts § 243(4).

Plaintiff's claim for total breach also fails because plaintiff has accepted performance by defendant under all of the contracts. Cf. Mobil Oil, 530 U.S. at 622 (stating that acceptance of part performance after repudiation constitutes waiver of restitution damages); PG&E, 70 Fed. Cl. at 772. In particular, the payments plaintiff made pursuant to the 1965 Repayment Contract were for the actual costs of constructing phase one of the contemplated drainage system, see 1939 Act § 9(d), 53 Stat. at 1195 (codified as amended at 43 U.S.C. § 485h(d)) (governing repayment contracts), which served Westlands from 1979 through 1985. Compl. ¶ 58; Def.'s Mot. 7. In other words, plaintiff's payments under the 1965 Repayment Contract were payments for performance already rendered. With respect to the water service contracts, plaintiff received water from defendant, pursuant to the 1963 Contract, beginning in 1967. Compl. ¶ 20; Def.'s Mot. 5. After the expiration of the 1963 Contract, plaintiff received water from defendant pursuant to further contracts for water service, including the 2007 and 2010 Interim Contracts, see supra Parts I.B.3-4, and plaintiff receives water from defendant presently, Def.'s Mot. 8; see Pl.'s App. 9-39 (2012 interim renewal contracts) (providing for water service into 2014). These facts indicate that plaintiff has accepted and continues to accept at least part performance under the water service contracts. Plaintiff argues that the government's obligation to provide water "is separate and divisible from its obligation to provide drainage," Compl. ¶ 156, but no such contractual drainage obligation exists, see supra Part III.A.1. Moreover, the 1963 Contract states that it is "indivisible for purposes of validation."[16] Def.'s App. A42 (1963 Contract).

For these reasons, the facts asserted by plaintiff do not state a plausible claim for relief based on a total breach theory. Cf. Iqbal, 556 U.S. at 678.

---

[16] The court understands the phrase "indivisible for purposes of validation" to indicate that the parties intended the contract to be entire and not severable. Cf. 17A C.J.S. Contracts § 443 (2012) (stating that "[t]he intention of the parties is a primary consideration in the determination of whether a contract is entire or severable" and "is to be ascertained from the terms or language of the contract," among other factors).

c. Anticipatory Breach of Contractual Drainage Obligations

Anticipatory breach, also known as repudiation, occurs when a contractually obligated party communicates that it will commit a breach that would constitute a total breach. See Mobil Oil, 530 U.S. at 608 (citing Restatement (Second) of Contracts §§ 243, 250, 373); Dow Chem. Co. v. United States, 226 F.3d 1334, 1344 (Fed. Cir. 2000). The repudiating party's refusal to perform its contractual obligation must be made "distinctly and unqualifiedly to the other party." Dow Chem. Co., 226 F.3d at 1334. An act may constitute a repudiation if it is "voluntary and affirmative" and "make[s] it actually or apparently impossible for [the obligated party] to perform." Restatement (Second) of Contracts § 250 cmt. c.

Plaintiff contends that the Feinstein Letter "is as clear a repudiation of the drainage obligation as there can be." Pl.'s Resp. 25. However, as discussed above, see supra Part III.A.1, no such contractual drainage obligation existed to be repudiated. Further, plaintiff has not shown that the letter is a distinct, unqualified refusal to perform a contractual duty, made by defendant to plaintiff. Cf. Dow Chem. Co., 226 F.3d at 1334. In particular, the letter cannot be characterized as the government's making a repudiation to Westlands because the letter was not addressed to Westlands. Compl. Ex. A (Feinstein Letter) 1. In addition, the letter did not even mention a contractual drainage obligation. Instead, it acknowledged the government's statutory drainage obligation and discussed the steps being taken to comply with that obligation. See id. at 1-2 (acknowledging the holding in Firebaugh that the "San Luis Act imposes on the Secretary a duty to provide drainage service to the [San Luis] Unit," discussing Interior's inability to implement a 2007 record of decision (the 2007 record of decision), and stating that sufficient appropriations "remained to allow Interior to construct one subunit of drainage facilities within Westlands Water District"). The letter also sought legislative assistance to comply with defendant's statutory drainage obligation, stating that, beyond one subunit of drainage facilities, Interior "will be unable to proceed without additional Congressional authorization." Id. at 2. Finally, the letter requested a legislative response and described "key elements of a long-term legislative drainage strategy" that the Administration would support. Id. at 2-4. These key elements included transferring irrigation drainage responsibility to local control, id. at 2, which plaintiff appears to have misinterpreted as a declaration "that from now on, the drainage obligation falls to the water districts on pain of losing their water," see Pl.'s Resp. 25. Nowhere does the letter say that defendant refuses to perform a contractual drainage obligation.

Plaintiff also contends that "the Government's forty years of failing to provide drainage and temporizing over the last twenty-six years is conduct from which a repudiation can be inferred." Id. at 26 (citing Restatement (Second) of Contracts § 250). However, for an act to constitute repudiation, it "must be both voluntary and affirmative, and must make it actually or apparently impossible for [the obligated party] to perform."

Restatement (Second) of Contracts § 250 cmt. c. The government's failure to provide drainage is not an affirmative act, nor has plaintiff alleged that it makes it actually or apparently impossible for the government to provide drainage in the future. Cf. id. And plaintiff has not shown any contractual obligation to provide drainage in the first place. See Part III.A.1.

Plaintiff has failed to allege facts sufficient to state a plausible claim for relief based on an anticipatory breach theory. Cf. Iqbal, 556 U.S. at 678.

3. Claim Six: Declaratory Relief Regarding Amounts to Be Paid Under the 1965 Repayment Contract and Any Future Repayment Contracts

Plaintiff requests that, if the court finds neither a total breach nor an anticipatory breach of a contractual drainage obligation by defendant, Compl. ¶ 165, that the court grant declaratory judgment for Westlands "that any obligations [plaintiff] has under Section 9(d) of the [1939 Act], 43 U.S.C. § 485h(d), the 1965 Repayment Contract and/or any future repayment contracts must be based on inflation adjusted dollars going back to when the work should have been done," id. ¶ 176. Defendant, without explaining its rationale, moves to dismiss this claim pursuant to RCFC 12(b)(6). See Def.'s Mot. 1.

The 1965 Repayment Contract, governed by 43 U.S.C. § 485h(d), where section 9(d) of the 1939 Act has been codified, provides for repayment of actual construction costs of the San Luis Unit. See supra Part I.B.2. In or about 1979, when the subsurface drainage system was connected to the completed portion of the interceptor drain and began providing drainage service to Westlands, see Compl. ¶ 52, plaintiff began making payments pursuant to the 1965 Repayment Contract for the actual costs of that completed phase of construction, id. ¶¶ 40, 53. Thus, all repayments made by plaintiff pursuant to the 1965 Repayment Contract were for construction completed by 1979. Plaintiff now appears to contend that the first phase of construction--and the entire contemplated drainage system--should have been completed in or around 1967, see id. ¶ 169, when the distribution system began delivering water to Westlands, id. ¶ 20. Plaintiff argues that it "should not be held responsible for" the "exponential[]" "escalation in construction costs . . . due to the Government's breach of its obligation to build the required drainage system in a timely manner." Id. ¶¶ 170-72.

The plain language of the statute and the 1965 Repayment Contract make clear that plaintiff is obligated to repay the actual costs of construction, with no provision for adjustment for inflation. Nothing in the language of the statute indicates that a party to a repayment contract has a right to adjust the actual costs of construction for inflation. Instead, the statute provides that "the part of the construction costs allocated by the Secretary to irrigation shall be included in a general repayment obligation." 43 U.S.C. § 485h(d)(2). Similarly, the 1965 Repayment Contract provides that "[Westlands] shall

repay to the United States the actual cost of the distribution system constructed and acquired pursuant to [the terms of the 1965 Repayment Contract]." Def.'s App. A134 (1965 Repayment Contract) (emphasis added).

Because plaintiff has not shown that either the 1965 Repayment Contract or the applicable federal reclamation laws would allow it to pay less than the actual costs of construction, plaintiff has failed to plead facts that raise a right to declaratory relief above a speculative level. Cf. Twombly, 550 U.S. at 555.

B. This Court Lacks Jurisdiction over Plaintiff's Claims, in Part

For the reasons stated in Part III.A, plaintiff has not pleaded facts sufficient to state a claim on which relief can be granted with respect to claims one through six. Defendant also moves under 12(b)(1) to dismiss plaintiff's claims one through four and six for lack of subject matter jurisdiction. If a court determines that it does not have subject matter jurisdiction over a claim, it must dismiss the claim. See RCFC 12(h)(3). The plaintiff bears the burden of showing jurisdiction by a preponderance of the evidence. Taylor, 303 F.3d 1357, 1359 (Fed. Cir. 2002).

1. Statute of Limitations

The Court of Federal Claims has an absolute, jurisdictional six-year statute of limitations, John R. Sand & Gravel Co., 552 U.S. at 133-34, which is measured from the date on which a claim first accrues, 28 U.S.C. § 2501. A claim first accrues "'when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action.'" Brighton Vill. Assocs., 52 F.3d at 1060 (quoting Kinsey, 852 F.2d at 557).

When a breach of contract claim is based on a failure to act, there are two prerequisites for accrual: (1) performance must be due, see id. (stating that a breach of contract claim arises when "a plaintiff had done all he must do to establish his entitlement to [performance] and the defendant does not [perform]"); see e.g., Brown Park, 127 F.3d at 1455 (stating that breach of contract claim based on government's failure to make proper rent adjustments accrued at specified times when the government failed to make the adjustments in violation of the contracts at issue), and (2) the plaintiff must have suffered damages because performance was not rendered, see Alder Terrace, Inc. v. United States, 161 F.3d 1372, 1377 (Fed. Cir. 1998) (finding that claim accrued when the plaintiff first suffered its alleged breach of contract damages); Terteling v. United States, 167 Ct. Cl. 331, 338, 334 F.2d 250, 254 (1964). When a breach is only partial, each subsequent partial breach constitutes a new and separate claim, each with its own statute of limitations. San Carlos Irrigation & Drainage Dist. v. United States (San Carlos), 23 Cl. Ct. 276, 280 (1991); see Restatement (Second) of Contracts § 236 cmt. a ("Every

breach gives rise to a claim for damages."). When a breach of contract claim is based on repudiation, the claim accrues either at the time of repudiation--if the non-breaching party chooses to treat the repudiation as a present breach--or at the time when performance is due--if the nonbreaching party chooses to await performance. Franconia Assocs. v. United States (Franconia), 536 U.S. 129, 144 (2002) (citing 1 C. Corman, Limitation of Actions § 7.2.1 (1991)).

Defendant argues that the statute of limitations bars plaintiff's claims one through four and six because "Westlands has alleged that the Government breached its contractual obligations . . . beginning in 1986" but "did not file suit until January 6, 2012." Def.'s Mot. 10. Plaintiff responds, "Because the Government's time for performance was indefinite and necessarily took time to complete, and because the Government continuously assured Westlands that performance would be forthcoming, no cause of action accrued until the Government made clear its intent to abandon its drainage obligation in September 2010 with the Feinstein Letter." Pl.'s Resp. 28. Defendant replies that the theory of accrual articulated by plaintiff in its Response "is based only upon the Government's alleged 'repudiation' of its purported contractual obligation to provide drainage," and, therefore, plaintiff "has abandoned any other theory on the time and manner by which it alleges breach occurred." Def.'s Reply 3.

Plaintiff's accrual argument appears to be based, at least in part, on the finding of the Westlands I court that payments pursuant to the 1963 Contract of the fifty-cent drainage rate component did not have to be applied to drainage costs in the same year in which they were collected. See Pl.'s Resp. 39 (citing Westlands I, 134 F. Supp. 2d at 1157 n.98). Plaintiff appears to reason that, because drainage component charges could potentially be applied to drainage service in a later year, there was "no date in the past when it can be said the Government's duty of immediate performance arose." See id. at 40. In other words, plaintiff contends that defendant's performance under the contract is not yet due. Under this line of reasoning, however, plaintiff's breach of contract claims can only be brought under a theory of repudiation. Cf. Franconia Assocs., 536 U.S. at 144 (stating that a claim based on repudiation occurs at the time of repudiation if the non-breaching party elects to treat the repudiation as a present breach); Brighton Vill. Assocs., 52 F.3d at 1060 (stating that a breach of contract claim arises when "a plaintiff has done all he must do to establish his entitlement to [performance] and the defendant does not [perform]"). Therefore, defendant is correct that certain language used by plaintiff in its Response, see, e.g., Pl.'s Resp. 28 (stating that "no cause of action accrued until the Government made clear its intent to abandon its drainage obligation in September 2010 with the Feinstein Letter"), appears to indicate that plaintiff has abandoned its breach of contract claims based on theories other than repudiation. However, plaintiff also repeats in its Response allegations of "continuous breach" of the purported drainage obligation since at least 1986--allegations that imply that defendant's performance of the purported contractual obligation was due by 1986. See Pl.'s Resp. 43 (internal quotation marks

omitted). Because plaintiff's allegations are conflicting, it is unclear whether plaintiff has abandoned its breach of contract claims based on theories other than repudiation. Accordingly, the court addresses each of plaintiff's claims, including those based on theories other than repudiation.

a. Claims One and Two: Past Breaches of Express and Implied Contracts

i. 1963 Contract, 1965 Repayment Contract and Any Implied Contract

A claim for breach of contract based on a failure to act first accrues when: (1) performance is due, see Brighton Vill. Assocs., 52 F.3d at 1060, and (2) the plaintiff suffers damages as a result of nonperformance, see Alder Terrace, Inc., 161 F.3d at 1377 (finding that claim accrued when the plaintiff first suffered its alleged breach of contract damages); Terteling, 167 Ct. Cl. at 338, 334 F.2d at 254. Plaintiff appears to contend that, because it had performed all conditions precedent by timely paying drainage components, Compl. ¶¶ 134, 140, continuing performance of the government's purported contractual drainage obligation was due in 1986, when drainage service was cut off, see id. ¶¶ 133 ("The United States has continuously breached [its contractual drainage] obligation by providing inadequate drainage facilities and services, and since at least 1986 by providing no drainage facilities or services at all"), 139 (same with respect to implied contract claim); see also Pl.'s Resp. 43. But see Pl.'s Resp. 40 ("[T]here was no breach of [the government's drainage] obligation sufficient to trigger the running of the Statute of Limitations . . . until it became clear [that] no drainage would be forthcoming."). Further, based on the facts pleaded, the damages or injuries alleged by plaintiff as a result of the government's purported breaches of a contractual drainage obligation generally were first suffered prior to 2006. These injuries include: paying for drainage facilities that were not built, paying for drainage services that were not delivered, paying for drainage facilities that have not functioned as required, paying for drainage services not of the quality and functionality required, paying more for delayed construction owing to inflation, paying for facilities, operations and services in anticipation of the contemplated drainage system that are now of diminished value, paying mitigation expenses and being forced to retire or fallow significant portions of land owing to the lack of drainage, and being deprived of the value of the contemplated drainage system. Compl. ¶ 130. The accrual date for each of these injuries is considered below.

Significantly, Westlands has been making the drainage component payments about which it complains since 1979. Id. ¶ 40. At that time, all drainage construction contemplated by the contracts had already been completed or suspended. Specifically, construction of the interceptor drain was suspended in 1975. See id. ¶ 51. Phases two and three of construction contemplated by the 1965 Repayment Contract were suspended in or about 1978. See id. ¶ 54. Therefore, plaintiff's alleged injuries with respect to

payment for facilities that were not built or that have not functioned as required arguably first accrued as early as 1979. Cf. Alder Terrace, Inc., 161 F.3d at 1377. Plaintiff has also been deprived of the value of the contemplated drainage system since at least 1978, when the second and third phases of construction were suspended. Compl. ¶ 54. Further, plaintiff's alleged injury of paying for drainage services not of the quality and functionality required would have first accrued by 1986, at the latest, because the drainage services Westlands received from 1979 through 1985 ended in 1986, see Compl. ¶¶ 58, 63-64, and no drainage has otherwise been provided since then, see id. ¶ 67; cf. Alder Terrace, Inc., 161 F.3d at 1377. Similarly, plaintiff's alleged injury of paying for drainage services that were not delivered appears to have first accrued in 1986, when plaintiff was first paying a drainage rate component but receiving no service. See Compl. ¶¶ 40, 67; cf. Alder Terrace, Inc., 161 F.3d at 1377. Additionally, the only actual costs of drainage construction plaintiff has paid were pursuant to the 1965 Repayment Contract for construction completed in 1979. See supra pp. 35 (explaining that "plaintiff's payments under the 1965 Repayment Contract were payments for performance already rendered"), 37 (explaining that "all repayments made by plaintiff pursuant to the 1965 Repayment Contract were for construction completed by 1979"). Any injury related to inflated construction costs repayable under that contract would have first accrued in 1979, when payments began. Cf. Alder Terrace, Inc., 161 F.3d at 1377. Lastly, plaintiff does not state when it first made other expenditures in anticipation of the contemplated drainage system, paid mitigation expenses and retired or fallowed significant portions of land owing to the lack of drainage. However, these are all alleged injuries stemming from a lack of drainage, and Westlands stopped receiving drainage in 1986. Therefore--based on the facts contained in plaintiff's pleadings--all the events that would fix the liability of the government with regard to any breach of the 1963 Contract, the 1965 Repayment Contract or any implied contract would have occurred before 2006, outside the limitations period. See 28 U.S.C. § 2501 (providing for six-year statute of limitations); cf. Brighton Vill. Assocs., 52 F.3d at 1060 (stating that a claim first accrues "'when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action'" (quoting Kinsey, 852 F.2d at 557)).

Plaintiff argues, however, that "even if the statute of limitations has run on some portion of Westlands' breach of contract claims . . . it has not run on damages suffered within six years of the filing of the complaint" pursuant to a partial breach theory or the continuing claims doctrine or both. Pl.'s Resp. 40 (capitalization and emphasis omitted); id. at 46. When a party sues for a partial breach, the party seeks damages for only part of its remaining rights to performance under the contract. Restatement (Second) of Contracts § 236(2); see, e.g., Yankee Atomic Electric Co. v. United States, 536 F.3d 1268, 1271-73 (Fed. Cir. 2008) (finding a partial breach when the government failed to remove radioactive waste over a twelve-year period after the contracting party had made the necessary contractual payments for removal and disposal). Each time a partial breach

of contract occurs, a new claim accrues with its own statute of limitations. San Carlos, 23 Cl. Ct. at 280.

In San Carlos, for example, a case relied upon by plaintiff in support of its partial breach theory, see Pl.'s Resp. 42, the government's failure to maintain a reservoir's spillway gates led to two minor overflows of the reservoir, San Carlos, 23 Cl. Ct. at 277-78. The San Carlos Irrigation and Drainage District sued the government for breach of a contractual duty to maintain the irrigation works, pursuant to a repayment contract. Id. at 278. The San Carlos court held that each minor overflow was a partial breach of the government's continuous duty to maintain the spillways and, although the first overflow was outside the statute of limitations, the second overflow was not time-barred because, as a partial breach, it constituted a newly accrued claim. Id. at 280-82.

Plaintiff argues that because the purported contractual drainage obligation owed by the government is "continuing," any partial breaches "occurring within the limitations period are not time-barred, even though breaches also occurred outside the period." Pl.'s Resp. 42. However, plaintiff fails to explain how any specific facts pleaded would support a finding of partial breach, instead relying on its allegations that the government's breach has been "continuous" and merely reciting the facts and findings in San Carlos, without explaining how that case supports its argument. See id. at 42-44. To the extent that any reports or schedules filed in connection with the Firebaugh litigation and any failures to act in accordance with any of these documents, the 2010 Feinstein Letter, unsuccessful repayment contract negotiations--or any other events alleged in the pleadings to have occurred after January 6, 2006--can be understood to be alleged as partial breaches, see Compl. ¶¶ 102-18, 122-27; Pl.'s Resp. 43-45, such claims would survive the statute of limitations, see 28 U.S.C. § 2501. Nevertheless, because plaintiff has failed to show any drainage obligation arising from the 1963 Contract, 1965 Repayment Contract or any implied contract that potentially could be breached by such actions, see supra Part III.A.1, these claims do not survive defendant's motion.

With respect to plaintiff's continuing claims argument, the continuing claims doctrine also allows new and independent breaches by the government to be treated as separate causes of action--each with its own statute of limitations.[17] See Boling, 220 F.3d

[17] The continuing claims doctrine has not been consistently recognized in this court. See Sankey v. United States, 22 Cl. Ct. 743, 746 (1991) ("This court no longer recognizes the continuing claims doctrine." (citing Hart v. United States, 910 F.2d 815, 817 (Fed. Cir. 1990))). Nonetheless, it is currently recognized and applied. See Nicholas v. United States, 42 Fed. Cl. 373, 377 (1998) (concluding that the rejection of the continuing claims doctrine in Hart had been abrogated by the decision of the United States Supreme Court (Supreme Court) in Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp of Cal., Inc., 522 U.S. 192 (1997)); see, e.g., Hatter v. United States, 203 F.3d 795, 799 (Fed. Cir. 2000) (describing requirements for

at 1373-74. Therefore, a continuing claim is similar to a partial breach in that it allows some claims to survive the statute of limitations; however, it is distinguishable in that it is narrower and generally applies to a series of continuing breaches of a systematic duty rather than to isolated partial breaches of a continuing contract. See San Carlos, 23 Cl. Ct. at 280 (distinguishing a continuing breach from partial breaches of a continuing contract).

For the continuing claims doctrine to apply, (1) the case must turn on pure issues of law (or specific issues of fact to be decided by the court for itself); (2) any facts involved must be "sharp and narrow"; and (3) no discretionary agency decision can be at issue. Hatter v. United States, 203 F.3d 795, 799 (Fed. Cir. 2000) (citing Friedman v. United States, 159 Ct. Cl. 1, 6-8, 310 F.2d 381, 384-85 (1962)), aff'd in part and rev'd in part on other grounds, 532 U.S. 557 (2001). Claims to which the continuing claims doctrine have been applied have been characterized as "inherently susceptible to being broken down into a series of independent and distinct events or wrongs, each having its own associated damages." Brown Park Estates-Fairfield Dev. Co. v. United States (Brown Park), 127 F.3d 1449, 1457-58 (Fed. Cir. 1997). For example, when a plaintiff has an absolute statutory or contractual right to periodic payments (independent of discretionary administrative action), a new claim accrues pursuant to the continuing claims doctrine with each failure to make a proper payment when it is due. See Hatter, 203 F.3d at 799-800; Brown Park, 127 F.3d at 1457-58; Friedman, 159 Ct. Cl. at 6-8, 310 F.2d at 384-85.

In contrast, "a claim based upon a single distinct event, which may have continued ill effects later on, is not a continuing claim." Brown Park, 127 F.3d at 1456; Harvest Inst. Freedman Fed'n v. United States, 80 Fed. Cl. 197, 200 (2008). Nor is the continuing claims doctrine applicable when all the events necessary to the claim occurred outside the statute of limitations, more than six years before the claim was brought. See, e.g., Dalles Irrigation Dist. v. United States, 88 Fed. Cl. 601, 612-13 (2009) (finding that an alleged breach by the Bureau of Reclamation of its duty to grant surplus credits for historical overcharges was not renewed each year because all events to fix liability would have occurred the first time such a credit was not granted); cf. Brighton Vill. Assocs., 52 F.3d at 1060 (stating that a claim first accrues "'when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action.'" (quoting Kinsey, 852 F.2d at 557)).

To the extent that plaintiff may be understood to argue that the Feinstein Letter (or other events alleged in the pleadings to have occurred after January 6, 2006) constituted new and independent breaches to which the continuing claims doctrine would be

---

continuing claims doctrine to apply) (citing Friedman v. United States, 159 Ct. Cl. 1, 6-8, 310 F.2d 381, 384-85 (1962)), aff'd in part and rev'd in part on other grounds, 532 U.S. 557 (2001).

applicable, see Pl.'s Resp. 43-45, such an argument fails. With respect to the first two requirements for the continuing claims doctrine, the court could infer an argument--based on plaintiff's statement that "the written agreements unambiguously establish a drainage obligation, but [Westlands] has not yet moved for summary judgment presenting that issue," Pl.'s Resp. 16 n.6--that the case turns only on pure issues of law or specific, "sharp and narrow" issues of fact to be decided by the court for itself, cf. Hatter, 203 F.3d at 799 (listing, inter alia, whether the case "turn[s] on pure issues of law or specific facts which the court is to decide for itself" and whether it requires the court to "resolve sharp and narrow factual issues" as factors to consider in determining whether the continuing claims doctrine applies); Friedman, 159 Ct. Cl. at 7, 310 F.2d at 384-85 (same). Nonetheless, the continuing claims doctrine is inapplicable because plaintiff concedes that this is a case involving agency discretion. See Compl. ¶ 88 (stating that, pursuant to Firebaugh, the government has discretion to determine how to provide drainage service to Westlands); cf. Hatter, 203 F.3d at 797-98 (stating that the continuing claims doctrine does not apply in cases involving agency discretion); Friedman, 159 Ct. Cl. at 6-8, 310 F.2d at 384-85 (same).

Further, unlike the periodic payment cases, this is not a case where a plaintiff has alleged a right to a series of periodic performances by defendant. Cf. Hatter, 203 F.3d at 799-800; Brown Park, 127 F.3d at 1457-58; Friedman, 159 Ct. Cl. at 6-8, 310 F.2d at 384-85. Instead, plaintiff states that although it owed "periodic drainage payments" pursuant to the 1963 Contract and 1965 Repayment Contract, neither contract "provide[d] a definite time for the Government to provide a complete drainage system, or even discrete segments of one"--in other words, that no "reciprocal" periodic performance was due from defendant. Pl.'s Resp. 38-39. In addition, the injuries alleged by plaintiff stem from the continued ill effects of suspension in or around 1978 of phases two and three of the construction contemplated by the 1965 Repayment Contract and the 1986 closing of the limited drainage provided to Westlands. See supra pp. 40-41 (discussing when injuries complained of by plaintiff first accrued); Pl.'s Resp. 45-46 (listing injuries and stating that "Westlands suffered substantial damages from the Government's continuing failure to provide drainage during the six years prior to the filing of the Complaint"); cf. Brown Park, 127 F.3d at 1456 (stating that the continuing claims doctrine does not apply to claims based on the continuing effects of a single, distinct event).

Finally, all of the events necessary to fix liability for plaintiff's breach of contract claims occurred outside the statute of limitations, that is, before January 6, 2006. Cf. Brighton Vill. Assocs., 52 F.3d at 1060 (stating that a claim first accrues "when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action." (internal quotation marks omitted)); Dalles Irrigation Dist., 88 Fed. Cl. at 612-13 (finding that an alleged breach by the Bureau of Reclamation of its duty to grant surplus credits for historical overcharges was not renewed each year because all events to fix liability would have occurred the first time such a credit was not granted).

The continuing claims doctrine is therefore inapplicable to plaintiff's breach of contract claims.[18]

ii. 2007 and 2010 Interim Contracts

With respect to the 2007 and 2010 Interim Contracts, plaintiff does not allege any specific instances of breach, but instead states that the contracts "carried forward" the purported drainage obligation, Pl.'s Resp. 14 (capitalization and emphasis omitted); see id. at 16, which it claims has been "continuously breached . . . since at least 1986," Compl. ¶ 133. To the extent that any of the events alleged in the pleadings to have occurred after January 6, 2006 can be understood to be alleged as breaches of the 2007 Interim Contract or 2010 Interim Contract, such claims would survive the statute of limitations. See 28 U.S.C. § 2501. Still, because plaintiff has failed to show any duty arising from those contracts that potentially could be breached by such actions, see supra Part III.A.1a.iii-iv, these claims do not survive defendant's motion.

b. Claim Three: Breach of the Implied Obligation of Good Faith and Fair Dealing

---

[18] Plaintiff also cites Franconia Assocs. v. United States (Franconia), 536 U.S. 129 (2002), which it claims is "instructive" for purposes of its continuing claims argument, Pl.'s Resp. 41-42. However, the Supreme Court in that case considered when a breach of contract claim accrued in the case of repudiation by the government, not whether the continuing claims doctrine applied. See Franconia, 536 U.S. at 149. Specifically, in Franconia the government's contractual obligation to accept prepayment on certain loans was repudiated by statute. Id. at 143-44. The government argued that the plaintiffs' claims first accrued when the statute was passed, nine years before the case was filed, and that, therefore, the plaintiffs' claims were barred by the statute of limitations. See id. at 138-39. The Court rejected the government's argument that a repudiation claim against the government accrues at the time of repudiation, stating the general rule that, when a party repudiates a contractual duty, the time when a claim accrues depends on whether the party chooses to treat the repudiation as a present breach or waits until the time for performance is due. Id. at 144-45. The court concluded that because the plaintiffs had not treated the passage of the statute as a present breach, no claim accrued until prepayment was attempted--because only then would government performance of the obligation to accept prepayments be due. Id. at 143. Therefore, the Court held that a plaintiff's claim was timely if filed within six years of that plaintiff's tender of a rejected prepayment. Id. at 149. It did not consider whether, with respect to a plaintiff's prepayments tendered more than six years before the suit was filed, claims by the same plaintiff for later tendered prepayments might be saved under the continuing claims doctrine.

Plaintiff fails to explain how Franconia relates to its continuing claims argument, and the court can discern no support for plaintiff's argument in the case.

A breach of the implied obligation of good faith and fair dealing occurs when a party acts in a way "specifically designed to reappropriate the benefits the other party expected to obtain from [the contract], thereby abrogating [its] obligations under the contract." Precision Pine, 596 F.3d at 829 (citing Centex, 395 F.3d at 1311). Plaintiff alleges that the government breached this obligation with respect to a purported drainage duty arising under the 1963 Contract, 1965 Repayment Contract, 2007 Interim Contract, 2010 Interim Contract and any implied contract by: not timely designing, developing and implementing a plan for adequate drainage--both initially and in response to court orders in Firebaugh and Sumner Peck--and failing to devote adequate resources and to seek necessary appropriations from Congress for these tasks; abandoning its original drainage plan and "any effort to provide drainage to the entire San Luis Unit and all of the lands in Westlands' service area in need of drainage"; designing and constructing an inadequate drainage system that led to the closing of the Kesterton Reservoir; closing the completed portion of the interceptor drain; "and ultimately abandoning its obligation altogether" in the Feinstein Letter. Compl. ¶ 147.

To the extent that any of these alleged breaches of the implied obligation of good faith and fair dealing took place after January 6, 2006, these claims would survive the statute of limitations. See 28 U.S.C. § 2501. However, because plaintiff has failed to show any contractual drainage obligation to which the implied obligation of good faith and fair dealing could attach, see supra Part III.A.2.a, these claims do not survive defendant's motion.

c. Claim Four: Total Breach

Plaintiff argues that the statute of limitations has not yet run on its claims for total breach because plaintiff has only now elected to sue for total breach based on defendant's "accumulated failures to perform." Pl.'s Resp. 37-38. When a party to a contract is in total breach, the non-breaching party may "elect to declare the contract terminated and sue for total breach or to continue the contract and sue for partial breach." PG&E, 70 Fed. Cl. at 771; Cities Serv. Helex, Inc., 211 Ct. Cl. at 234-35, 543 F.2d at 1313. If the nonbreaching party elects to continue performance under the contract, it is precluded from later suing for total breach. See PG&E, 70 Fed. Cl. at 771 (deriving from Hansen, 367 F.3d at 1309, that restitution damages for total breach and damages for partial breach are "inconsistent and incompatible remedies"). If the party elects to sue for total breach, the claim accrues at the time of the total breach. See Brighton Vill. Assocs., 52 F.3d at 1060 (stating that a claim accrues "'when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action'" (quoting Kinsey, 852 F.2d at 557)).

Plaintiff's argument that the statute of limitations has not yet run on its claim for total breach appears to be based on plaintiff's contention that "the Government's time to

satisfy its duty to provide drainage was indefinite." Pl.'s Resp. 38-39. As discussed above, plaintiff appears to reason, based on the finding of the Westlands I court that drainage component payments could be applied to service in later years, that no immediate obligation to perform the purported drainage obligation arose until it was no longer reasonable for plaintiff to believe that such performance would be forthcoming. See supra Part III.B.1; Pl.'s Resp. 39-40. To the extent that the court can construe plaintiff's assertion that "it finally became clear that the Government would never provide the drainage facilities required by the Contracts" in 2010, Pl.'s Resp. 40, as an allegation of total breach based on this theory, such a claim would have accrued in 2010 and would not be barred by the statute of limitations, see 28 U.S.C. § 2501; cf. Brighton Vill. Assocs., 52 F.3d at 1060 (stating that a claim accrues "when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action" (internal quotation marks omitted)). However, in making its case that the statute of limitations has not run on its claim for total breach, plaintiff undermines this claim by what appears to be a retraction of it, stating simply that "there was no breach." Pl.'s Resp. 40. While such a statement is consistent with plaintiff's accrual theory based on repudiation, see infra Part III.B.1.d; cf. Franconia, 536 U.S. at 143 ("[T]he promisor's renunciation of a 'contractual duty before the time fixed in the contract for . . . performance' is a repudiation." (emphasis in original) (quoting 4 Corbin, Contracts § 959 (1951))), it is inconsistent with a claim for total breach. Either way, plaintiff has not stated a claim for total breach on which relief can be granted because plaintiff has not shown any right to remaining performance of a contractual drainage obligation and plaintiff has accepted performance under the contracts, precluding such a claim. See supra Part III.A.2.b.

d. Claim Five: Anticipatory Breach

When a breach of contract claim is based on anticipatory breach, also known as repudiation, the claim accrues either at the time of repudiation--if the non-breaching party chooses to treat the repudiation as a present breach--or at the time when performance is due--if the nonbreaching party chooses to await performance. Franconia, 536 U.S. at 144; see Kinsey, 852 F.2d at 558. Defendant concedes that the court has jurisdiction over plaintiff's claim for anticipatory breach. Def.'s Mot. 10. The court must nevertheless determine whether such jurisdiction exists. See Steel Co., 523 U.S. at 94-95; PODS, Inc., 484 F.3d at 1365. As discussed above, plaintiff contends that performance of the purported drainage obligation was never due. See supra Part III.B.1.c; cf. Franconia, 536 U.S. at 143 (stating that a renunciation of a contractual duty before it is due is a repudiation). Thus, plaintiff's claim for anticipatory breach would have accrued at the time of the alleged repudiation. Cf. Franconia, 536 U.S. at 144.

In its Complaint, plaintiff identifies a number of events that it alleges constituted anticipatory breaches, specifically: "express and implied repudiation of an intent to

implement the 2007 record of decision," "implied repudiation demonstrated by the Government's course of conduct" in failing to provide actual drainage since 1986, and the "demonstrated (and indeed professed) inability of the government to provide drainage, as most recently exemplified in the Feinstein Letter." Compl. ¶ 158. To the extent that plaintiff can be understood to allege that a drainage obligation pursuant to the 1963 Contract, 1965 Repayment Contract or any implied contract was repudiated by defendant's actions in 1986--or at any other time before January 6, 2006--such a claim would be time-barred. See 28 U.S.C. § 2501. However, in its Response, plaintiff states that the statute of limitations did not begin to run on any of its claims "until the Government made clear its intent to abandon its drainage obligation in September of 2010 with the Feinstein letter." Pl.'s Resp. 28. To the extent that this statement may be understood to retract any allegations of repudiation prior to the Feinstein Letter, plaintiff's claim of repudiation of a contractual drainage obligation would be viewed as having allegedly occurred in 2010 and would survive the statute of limitations. However, because plaintiff has shown neither that such a contractual drainage obligation existed to be repudiated nor that the Feinstein Letter constituted a repudiation, this claims fails to survive defendant's motion. See supra Part III.A.2.c.

e. Claim Six: Declaratory Relief

Because "claims for declaratory relief necessarily derive from claims for substantive relief," the statute of limitations for the underlying action at law generally is applied to an accompanying action for declaratory relief. 26 C.J.S. Declaratory Judgments § 120 (2012). Here, plaintiff requests that, in the event that it is not granted money damages for its claims one through five, it be granted declaratory judgment "adjusting [for inflation] its obligation to pay for construction of a drainage system under the 1965 Repayment Contract or similar contracts to be executed in the future." Compl. ¶ 165; see id. at 52.[19] Plaintiff argues that such relief is warranted because of the "escalation in construction costs . . . due to the Government's breach of its obligation to build the required drainage system in a timely manner." Id. ¶ 171.

To the extent that plaintiff's claims of breach of a contractual drainage obligation survive the statute of limitations, see supra Parts III.B.1.a-d, plaintiff's claim for declaratory relief derived from those claims also survives the statute of limitations, see 26 C.J.S. Declaratory Judgments § 120. However, as discussed above, plaintiff has failed to state a claim for declaratory judgment on which relief can be granted. See supra Part III.A.3. Further, plaintiff's claim for declaratory relief is not within the court's subject matter jurisdiction, as explained below. See infra Part. III.B.2.

[19] The court cites to plaintiff's Prayer for Relief, which appears on pages fifty-one and fifty-two of its Complaint, by page number rather than paragraph number.

2. This Court Lacks Jurisdiction to Grant the Declaratory Relief Sought by Plaintiff

Plaintiff requests two types of declaratory judgment. First, plaintiff requests that, in the alternative to money damages pursuant to claims one through five, the court grant declaratory judgment pursuant to claim six, adjusting plaintiff's payment obligations related to drainage construction costs "based on inflation adjusted dollars going back to the period when the work should have been done." Compl. 52; see Pl.'s Resp. 46-47. Plaintiff also seeks declaratory relief in connection with claims four and five of the severability of defendant's contractual obligation to provide water service from its alleged contractual obligation to provide drainage, Pl.'s Resp. 46; see Compl. ¶¶ 156, 163, and an accompanying declaration that, while defendant remains obligated under its water supply contracts to supply water to Westlands and is required in good faith to negotiate for a long-term extension, plaintiff is "relieved of all further responsibility to pay for drainage services or facilities under its contracts" with defendant, both now and in future contracts extending water service, Compl. 51. Defendant argues that "Westlands'[] requests for declaratory relief are not within the jurisdiction of this Court because they are distinct from any claim for money damages and are prospective in nature." Def.'s Reply 5.

Declaratory relief, with respect to a breach of contract claim such as this one, is only within the court's jurisdiction if (1) declaratory judgment is "necessary to the resolution of a claim for money presently due and owing," Hydrothermal, 26 Cl. Ct. at 16, or (2) the declaratory judgment, "as an incident of and collateral to" a money judgment, "direct[s] restoration to office or position, placement in appropriate duty or retirement status, [or] correction of applicable records," 28 U.S.C. § 1491(a)(2). Declaratory relief is prospective, and therefore beyond the court's jurisdiction, if the consequences of adjudication would flow through the contractual scheme governing the party's relationship and have a future impact on that relationship. See Katz v. Cisneros, 16 F.3d 1204, 1209 (Fed. Cir. 1994).

Plaintiff argues that "'[t]he test for determining if a case belongs in the Claims Court is whether or not the 'prime objective' or 'essential purpose' of the complaining party is to obtain money from the federal government.'" Pl.'s Resp. 48 (quoting Eagle-Picher Indus., Inc. v. United States (Eagle-Picher) 901 F.2d 1530, 1532 (10th Cir. 1990)). Although government contracts claims generally can be brought in either the Court of Federal Claims or district court, the Court of Federal Claims has exclusive jurisdiction when the amount of the claim against the United States exceeds ten thousand dollars. 28 U.S.C. § 1346(a)(2) (2006). Here, the test discussed by plaintiff is the test used to determine whether the Court of Federal Claims (or its predecessor, the Claims Court) has exclusive jurisdiction over a suit, such that it could not be brought in district court--not whether the court has subject matter jurisdiction over a particular claim alleged in a suit.

See Eagle-Picher, 901 F.2d at 1532 ("'A party may not circumvent the Claims Court's exclusive jurisdiction by framing a complaint in the district court as one seeking injunctive, declaratory or mandatory relief where the thrust of the suit is to obtain money from the United States.'" (quoting Rogers v. Ink, 766 F.2d 430, 434 (10th Cir. 1985)); 28 U.S.C. § 1346(a)(2).

Plaintiff, apparently misunderstanding the purpose of this test, mistakenly places its reliance on cases in which an appeals court found that the Court of Federal Claims or the Claims Court had exclusive jurisdiction over a suit despite the inclusion of claims for declaratory or injunctive relief. Specifically, plaintiff compares its claim six to the facts of Colorado Department of Highways v. U.S. Department of Transportation (Colorado DOH), 840 F.2d 753 (10th Cir. 1988), and Brazos Electric Power Cooperative, Inc. v. United States (Brazos Electric), 144 F.3d 784 (Fed. Cir. 1998). See Pl.'s Resp. 49. In Colorado DOH, the plaintiff and intervenor sought money damages for purported overcharges as a result of an allegedly incorrect accounting method and also sought an injunction against the use of that accounting method in the future. Colorado DOH, 840 F.2d at 754-55. The United States Court of Appeals for the Tenth Circuit (Tenth Circuit) ordered the district court to dismiss the complaint for lack of jurisdiction, finding that the Claims Court had exclusive jurisdiction over the suit because (1) it was brought against the United States, (2) was based on a government contract and (3) was for money damages exceeding $10,000--even though it also sought injunctive relief. Id. at 756-57 (citing Rogers, 766 F.2d at 433); cf. 28 U.S.C. § 1346(a)(2). The Tenth Circuit did not hold that the Claims Court could grant the injunctive relief requested--only that the district court did not have jurisdiction to hear the case. Similarly, in Brazos Electric, the Federal Circuit affirmed a transfer order of the district court (ordering the case transferred to the Court of Federal Claims) because the plaintiff sought a cancellation of a debt owed to the federal government in excess of ten thousand dollars. Brazos Electric, 144 F.3d at 785-87. The Federal Circuit rejected the plaintiff's characterization of its claim as one for "the equitable relief of a declaration of rights and an injunction." Id. at 786. Instead, the Federal Circuit reasoned that the result of the judgment sought--that a prepayment penalty would either be refunded or credited toward the plaintiff's other debt--was "just as much a form of monetary damages for purposes of the Tucker Act as the direct payment by the federal government of conventional money damages." Id. at 787.

Relying on these cases, plaintiff first asserts that "[l]ike the relief sought in Colorado [DOH], the relief sought here would affect how reimbursements to the Government were calculated in the future." Pl.'s Resp. 49. Plaintiff continues that, "like the relief sought in Brazos [Electric], the relief sought here would relieve Westlands of an obligation to pay the Government a portion of what the Government intends to charge for construction of the drainage system." Id. However, plaintiff's comparisons are inapt. The Tenth Circuit's decision in Colorado DOH was based on the fact that the plaintiff and intervenor in that case claimed presently due and owing money damages in excess of

ten thousand dollars--and in fact were awarded $845,454.05 and $4,816,772.21, respectively. Colorado DOH, 840 F.2d at 755. Because the money damages claimed exceeded ten thousand dollars, the district court lacked jurisdiction over the entire case, even though the plaintiff and intervenor also sought injunctive relief. See id. at 755-56; cf. 28 U.S.C. § 1346(a)(2). The Tenth Circuit did not hold that the Court of Federal Claims had jurisdiction to grant declaratory judgment as to how reimbursements would be calculated in the future--making plaintiff's reliance on this case misplaced. Similarly, the court's decision in Brazos Electric turned on the fact that the plaintiff sought a refund that was presently due and owing in the amount of approximately $16.5 million. See Brazos Electric, 144 F.3d at 789. Although the plaintiff characterized its claim as one for injunctive and declaratory relief, the Federal Circuit held that it was actually a claim for money damages in excess of ten thousand dollars. Id. at 787. These cases do not stand for the proposition that the Court of Federal Claims has jurisdiction to grant declaratory relief of the type sought by plaintiff and, therefore, do not support plaintiff's argument that the court has jurisdiction to grant such relief.

Indeed, plaintiff's claim six is asserted as an alternative to money damages, see Compl. 51-52, and, therefore, cannot be said to be necessary to the resolution of a claim for money presently due and owing. cf. Hydrothermal, 26 Cl. Ct. at 16. Instead, the claim is prospective because, as plaintiff states, "it would affect how reimbursements to the Government were calculated in the future," Pl.'s Resp. 49, meaning that the consequences of such a declaratory judgment would flow through the repayment contract scheme governing the party's relationship and have a future impact on that relationship, cf. Katz, 16 F.3d at 1209. In addition, the inflation-based adjustments plaintiff seeks fall outside the three narrow situations where declaratory relief may be available "as an incident of and collateral to" a money judgment because the requested declaratory relief cannot be characterized as a "restoration to office or position, placement in appropriate duty or retirement status, [or] correction of applicable records." Cf. 28 U.S.C. § 1491(a)(2).

With respect to plaintiff's requests for declaratory relief in connection with its fourth and fifth claims (total and anticipatory breach, respectively), plaintiff argues that such relief is necessary to the resolution of these claims because the claims "are conditioned on their not resulting in release of the Government's obligation to provide water." Pl.'s Resp. 48-49.

Plaintiff misunderstands what is meant by "necessary to the resolution of a claim for money damages presently due and owing." See Hydrothermal, 26 Cl. Ct. at 16. When a plaintiff sues for anticipatory repudiation or total breach, it declares the contract terminated and sues for damages that reflect its remaining rights to performance under the contract. See Cities Serv. Helex, Inc., 211 Ct. Cl. at 234-35, 543 F.2d at 1313; PG&E, 70 Fed. Cl. at 771. Here, however, plaintiff seeks to continue receiving water

service from defendant and so is unwilling to terminate its water service contracts. See Compl. ¶¶ 156, 163 (stating that plaintiff withdraws its fourth and fifth claims if the court does not declare that the government's water service obligation is severable from the purported drainage obligation). Moreover, with respect to plaintiff's total breach claim as it relates to past contracts, plaintiff's acceptance of part performance by taking water deliveries operates as a waiver of such claims. See supra Part III.A.2.b; cf. Mobil Oil, 530 U.S. at 622 ("[A]cceptance of performance under a once-repudiated contract can constitute a waiver of the right to restitution that repudiation would otherwise create."). Plaintiff seeks a declaration of severability to overcome these problems: such a declaration would allow plaintiff to continue receiving benefits of the contracts--water service--while suing for only part of the alleged remaining performance--the drainage obligation--and would avoid the problem of waiver. However, such a declaration is not necessary to the resolution of plaintiff's claims; it is necessary only for plaintiff to prevail on them in the way that it wants. See supra Parts III.A.2.b-c (discussing plaintiff's claims four and five); cf. Hydrothermal, 26 Cl. Ct. at 16.

In addition, the declarations sought by plaintiff in connection with its claims for total and anticipatory breach are prospective because they would result in relieving plaintiff of present and future responsibilities, impacting the contractual relationship between the parties in the future. See Compl. 51 (requesting a declaratory judgment that "Westlands is relieved of all further responsibility to pay for drainage services or facilities under its contracts with the United States, including . . . future extensions" of water service contracts) (emphasis added); cf. Katz, 16 F.3d at 1209. Lastly, such declaratory relief is not incidental or collateral to money damages because it does not constitute a "restoration to office or position, placement in appropriate duty or retirement status, [or] correction of applicable records." Cf. 28 U.S.C. § 1491(a)(2).

The court, therefore, holds that it lacks subject matter jurisdiction over plaintiff's requests for declaratory judgment, and that plaintiff's claim six and requests for declaratory relief with respect to claims four and five must be dismissed. Cf. RCFC 12(h)(3) (providing that the court must dismiss claims over which it lacks jurisdiction).

3. Interest

Although plaintiff requested pre- and post-judgment interest in its Prayer for Relief, see Compl. 52, plaintiff has since conceded that the court lacks jurisdiction to grant this request, see Pl.'s Resp. 1; see also Def.'s Mot. 12 (arguing that the court lacks jurisdiction over plaintiff's interest claims). The court does not consider the issue further.

IV. Conclusion

For the reasons stated, a number of plaintiff's claims are DISMISSED-IN-PART for lack of subject matter jurisdiction pursuant to RCFC 12(b)(1) and 12(h)(3). Specifically, the statute of limitations bars the portions of plaintiff's claim one with respect to past breaches of the 1963 Contract and 1965 Repayment Contract and plaintiff's claim two of past breach of an implied contract--except to the extent that plaintiff can be understood to allege that events identified in the pleadings and occurring after January 6, 2006 constituted partial breaches. See supra Part III.B.1.a.i. Similarly, the portions of plaintiff's claim one with respect to past breaches of the 2007 and 2010 Interim Contracts are time-barred--except to the extent that events identified in the pleadings and occurring after January 6, 2006 can be understood to be alleged as breaches of either or both of the 2007 Interim Contract or 2010 Interim Contract. See supra Part III.B.1.a.ii. Plaintiff's claim three also must be dismissed as outside the limitations period except to the extent that any of the alleged breaches of the implied obligation of good faith and fair dealing occurred after January 6, 2006. See supra Part III.B.1.b. And, to the extent that plaintiff can be understood to allege that defendant's actions in 1986, or any time prior to January 6, 2006, constituted a repudiation of a contractual drainage obligation, such portions of plaintiff's claim five would also be time-barred. See supra Part III.B.1.d.

Plaintiff's claim six for declaratory relief and requests for declaratory relief associated with claims four and five are DISMISSED because they are outside the court's limited authority to grant declaratory relief, see supra Part III.B.2, and, to the extent that they derive from plaintiff's time-barred claims, they are also time-barred, see supra Part III.B.1.e.

The remainder of plaintiff's claims are DISMISSED pursuant to RCFC 12(b)(6), for failure to state a claim upon which relief can be granted. See supra Part III.A.

Defendant's Motion is therefore GRANTED. Pursuant to this Opinion, the Clerk of Court is directed to enter judgment dismissing the case.

IT IS SO ORDERED.

s/ Emily C. Hewitt
EMILY C. HEWITT
Chief Judge

EXHIBIT A

Table of Contents

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of June, 2013, I electronically filed the foregoing Opening Brief Of Appellant Westlands Water District with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

/s/ Peter D. Keisler
Peter D. Keisler
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202)736-8000

Counsel for Plaintiff/Appellant

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) or Federal Rule of Appellate Procedure 28.1(e).

☒ The brief contains 13,723 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii),

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) or Federal Rule of Appellate Procedure 28.1(e) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6).

☒ The brief has been prepared in a proportionally spaced typeface using: Microsoft Word 2003 in 14 point font Garamond.

/s/ Peter D. Keisler
Peter D. Keisler
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202)736-8000

Counsel for Plaintiff/Appellant

From: Tom Birmingham
Sent: Wednesday, July 10, 2013 11:11 AM
To: joe.findaro@akerman.com; 'Denny Rehberg'; 'Cardoza, Dennis'; vin@cwdc.com; 'Karen, Catherine'; 'Bernhardt, David L.'
Subject: Web Site

The website for the Latino outreach program is:

www.aguaasuntodetodos.com